

**The London School of Economics and Political
Science**

***Caseflow Management: A Rudimentary Referee Process,
1919-70***

Michael Paul Reynolds

A thesis submitted to the Department of Law of the London
School of Economics for the degree of Doctor of Philosophy,
London, July 2008

UMI Number: U615990

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI U615990

Published by ProQuest LLC 2014. Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code.



ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

THESES

F

9015



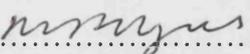
14782

Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made. This thesis may not be reproduced without the prior written consent of the author.

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.


.....

Michael P Reynolds

Abstract

This thesis discovers that a form of caseflow management was practised by Official Referees in England more than 70 years before the Woolf reforms. It also describes an innovative concept of judicial sponsorship of settlement at an early interlocutory stage. For its time it was revolutionary. Such process created a distinct subordinate judicial culture which promoted economy and expedition in the management of complex technical cases. This culture was facilitated by the referees' subordinate function as officers of the High Court and the type of casework undertaken.

The essential elements of my theory of rudimentary micro caseflow management emerge from a study of the methods used by Sir Francis Newbolt K.C. These are analysed and discussed by way of a literature review, qualitative and quantitative analysis. I conclude that this form of rudimentary caseflow management and judicial settlement process made the court more efficient. This process, identified as Newbolt's "Scheme," is traced from its inception through the judicial activities of Newbolt and other referees who followed this approach whether actively or passively.

Having traced the origin and reasons for such officers this study considers the senior and subordinate judicial figures involved, their influence and encouragement as to the employment of innovative interlocutory techniques. Contemporaneous records including reports and correspondence are analysed in considering these innovations.

The analysis is supported by the results of a quantitative study of *Judicial Statistics* between 1919 and 1970 and other contemporaneous judicial records including the referees' notebooks and judicial time records known as Minute Books.

A number of conclusions are drawn which suggest a correlation between such techniques and levels of efficiency providing an interesting comparison for those interested in wider questions of civil justice reform.

281 words

Acknowledgements

This research arose out of an interest in civil litigation and alternative dispute resolution both from practice as a solicitor and an arbitrator, and from a study of these subjects at Master's level. The interface between these diverse disciplines has always fascinated me and therefore the opportunity of undertaking doctoral research on the court where I practised was particularly inviting. My interest also stems from observations as an arbitration pupil to the last Senior Official Referee, John Newey QC and the business-like and "user friendly" way, in which he and those appearing before him conducted interlocutory proceedings. Further impetus for my research stems from an interest in the Access to Justice Movement and civil justice reform. It seemed to me that many of the recent reforms may have had their origin in what was the Official Referees' Court and that what they did decades ago has only recently been adopted across the system as a whole. This thesis does not set out to prove that, but certainly demonstrates an undiscovered prototype model which may teach us further lessons and contribute to the literature on this subject.

Procedural reform is not necessarily the collective responsibility of judges, lawyers and parties to litigation. Today it goes beyond that to all those eminent academics who have enriched our knowledge of the system and who have an essential role to play within that system. All must strive for greater procedural efficiency and effectiveness as well as economy, learning from the experiences of the past. As Professor Marc Galanter wrote:

Lawyers and judges have a joint responsibility with the academic community to foster and support the development of a cumulative body of reliable knowledge about the working of legal institutions, and they have a heavy stake in its development.¹

It is fitting that this study was undertaken at the London School of Economics part of whose expanding modern complex now inhabits the former referees' chambers in Portugal Street and one of whose founders, Lord Haldane, Lord Chancellor of England, was a strong supporter of the referee's office. It was Haldane who in the military field had said that "economy and efficiency were not incompatible," a

¹ *How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994).

theme which finds much in empathy in an entirely different context with the hero of this story Sir Francis Newbolt K.C.

This study and its completion would not have been possible without the inspiration, patience and encouragement of Professor Simon Roberts my supervisor. For many years he has been a leading exponent of a more enlightened and efficient resolution process. In that endeavour he was joined by Professor Michael Zander, my second supervisor, who in the field of civil justice reform must be regarded as a legend in his own time.

Neither would such study and research have been feasible without the facilities extended to me by the LSE Law Department, the LSE library, the National Archive, and Lambeth Palace Library. I would like to thank Mr Justice Jackson, Mr Justice Dyson (as he then was), Judge Anthony Thornton QC, and Judge Edgar Faye QC who were kind enough to discuss aspects of the Official Referees' role.

To my family I owe a debt of enormous forbearance.

Abstract	3
Acknowledgements	4
Table of Contents	6

Table of Contents

Chapter 1

A Study in Rudimentary Caseflow Management

1.1. Incipient micro-caseflow management	23
1.2. Caseflow management theory	24
1.3. Purpose of research study	24
1.4. Importance and interest	25
1.5. Hypothesis	27
1.6. Research questions	28
1.7. Use of research	28
1.8. Evolution of the referee	29
1.9 Limitations on research	33
1.10 Methodology	34
1.11 Organisation of study	37
1.12 Contribution to research in civil justice and dispute resolution	38

Chapter 2

In Chancery: The Inception of Micro Caseflow Management

2.1 Macro-management problems in the civil justice system	39
2.2 Judicial overload and backlog	39
2.3 First Report of the Commissioners 1869	42
2.4 The Official Referee: reasons for creation	42
2.4.1 Chancery and Common Law practice	42
2.4.2 Experts	44
2.4.3 Juries	45
2.4.4 Arbitrators	45
2.5 The Judicature reforms	46
(a) Administrative reform	47
(b) Procedural reform	47
2.6 Pioneers of caseflow management: Selbourne and Cairns	49
2.6.1 Lord Selbourne	49
2.6.2 Selbourne's macro and micro objectives	49

2.6.3 A judge without jurisdiction	51
2.6.4 <i>Rules of the Supreme Court</i>	52
2.6.5 Lord Cairns 1874-80	54
2.7. Importance of chambers business	57
2.8. Legacy of the Commission	58
2.9 The growth in referral business	59
2.10 Conclusions at macro-level-general	64
2.11 Conclusions at macro-level-specific	65
2.12 Conclusions at micro-level	66

Chapter 3

Rudimentary Prototypes in Caseflow Management Techniques (1919-1949)

3.1. A beginning	68
3.1.1 Sir Francis Newbolt	68
3.1.2 Lord Birkenhead	69
3.1.3 Sir Edward Pollock	69
3.1.4 Sir Tom Eastham	70
3.1.5 William Hansell	70
3.1.6 George Scott K.C	71
3.2. Definition of theory	71
3.3. Micro caseflow management	71
3.4. Events leading to the invention of caseflow management and judicial settlement	72
3.5. Explanation of theory	74
3.6 Against the theory	75
3.7 Exposition of the basis for a theory: Newbolt's first report to the Lord Chancellor	75
3.8 Discussion and analysis of elements of rudimentary caseflow management	
3.8.1 Early procedural evaluation and rudimentary informal referee resolution	84
3.8.2 Judicial intervention promoting expedition and economy	90
3.8.3 Experts	90
(a) Use of single joint expert/court expert	90
(b) Expert determination and investigators of fact	92
(c) Experts and settlement	93
3.9 Application of proportionality on costs	94

3.10	Invention of special pleadings	97
3.11	Preliminary issues and questions for the court	97
3.12	Geographic and more economic location for the parties	98
3.13	Conclusions	100

Chapter 4

From Rudimentary Prototypes to an Early Model Form of Micro-Caseflow Management

4.1	In search of Newbolt's "Scheme"	102
4.2	The Eastham Memorandum	102
4.2.1	Acting as a jury	106
4.2.2	Acting as an arbitrator	107
4.3.	Further discussion and analysis of rudimentary caseflow management: methodology applied to judicial records (1946-70)	107
4.3.1	Early procedural evaluation and informal referee resolution	108
4.3.2	Judicial intervention promoting economy and expedition	111
4.3.3.	Experts.	
	(a) Use of single joint expert/court expert	123
	(b) Expert determination and investigators of fact	125
	(c) Experts and settlement	128
4.3.4	Application of proportionality on costs	129
4.3.5	Invention of special pleadings	132
4.3.6	Preliminary issues and questions for the court	134
4.3.7	Geographic and economic location for the parties	142
4.4	Other aspects of rudimentary caseflow management	143
4.4.1	Early directions hearings	143
4.4.2	Inter-referee transfers	144
4.4.3	Enquiry and report	144
4.4.4	Necessity for caseflow management	146
4.4.5	Preliminary assessment of the "Scheme"	147
4.5	Conclusions as to literature review and qualitative analysis	150
4.5.1	As to early procedural evaluation	150
4.5.2	As to judicial intervention promoting economy and expedition	150
4.5.3	As to experts	151
4.5.4	As to proportionality of costs orders	152

5.6.1 Data analysis: Minute Books	186
5.6.2 Time expended (<i>Judicial Statistics</i>)	187
5.6.3 Time expended (Minute Books)	189
5.6.4 Caseflow time management analysis	190
5.6.5 Micro-caseflow management elements	191
5.7 Data analysis 2: Minute Books 1965-67	192
5.7.1 Time expended (<i>Judicial Statistics</i>) 1965-67	193
5.7.2 Time expended (Minute Books) 1965-67	194
5.7.3 Caseflow time management analysis 1965-67	195
5.7.4 Micro-caseflow management elements 1965-67	197
PART D CONCLUSIONS AS TO QUANTITATIVE ANALYSIS	
5.8 Summary and general conclusions	199
5.9 Direct best evidence of micro-caseflow management	201
5.9.1 Proportionate usage of rudimentary caseflow management 1959-62, and 1965-67	205
5.9.2 The utility of micro-caseflow management	205
5.9.2.1 Before the war (1919-38)	206
5.9.2.2 After the war (1947-70)	206
5.9.2.3 Case and non case- managed (1959-62)	207
5.9.2.4 Case and non case- managed (1965-67)	207
5.9.3 Possible extent of referee case-managed cases	207
5.10 Specific conclusions on quantitative analysis	208
 Chapter 6	
The Implementation of Micro-caseflow Management.	
6.1 Synthesis of macro and micro-caseflow management	216
6.1.1 Macro-caseflow management level	216
6.1.2. Subordinate jurisdiction as a facet of macro-caseflow management	219
6.1.3 Aspects of subordinate jurisdiction	220
6.1.4 Conclusions as to subordinate jurisdiction	223
6.2 Evaluating contradictory trends and results of the two periods	224
6.2.1. Significance of the “Scheme”	226
6.2.2 Effectiveness of the “Scheme”	227
6.2.3 General conclusions	228
6.2.4 Analysis of backlog	229

6.3 Referee micro-caseflow management overview	233
6.3.1 Backlog problem	233
6.3.2 Possible effect of caseflow management	234
6.3.3 Nature of referrals and probable cause of delay	235
6.4 Research limitations	237
6.5 Referee workload	238
6.6 Conclusions	238

Chapter 7

Expedition and Economy in Caseflow Management: Conclusions and Recommendations

7.1 Research questions	241
As to:	
(a) why the office of referee was invented and what caused and facilitated case-flow management?	241
(b) what was Newbolt's "Scheme," and what were the reasons for his application of this rudimentary form of case management?	242
(c) what was the impact of such "Scheme" according to the literature review of the archival materials that survive and what conclusions can be drawn?	249
(d) to what extent did Newbolt's "Scheme" promote expedition and economy in the court's work?	243
(e) to what extent, if at all, did the referees promote settlement and save costs?	245
(f) what was the impact of this "Scheme" as ascertained by qualitative and quantitative analysis of <i>Judicial Statistics</i> and the original court records?	249
7.2. Discussion of hypothesis of efficiency and economy	249
7.3. Support for hypothesis of efficiency and economy	250
7.4. The advantage of a subordinate judicial official	252
7.5. The procedural judge	253
7.6` Synthesis from study	254
7.7. <i>For hypothesis</i>	258
7.8. <i>Against hypothesis</i>	260

Chapter 8

In Pursuit of Justice

8.1. Key findings from research	262
8.2 Of Woolf and Newbolt; contrasting case management concepts	263
8.3 The "Scheme" and ADR concepts	265

8.4 Reconciling critiques	268
8.5 A new model judge	270
8.6 Ariadne's thread	272
8.7 Sailing on the <i>Arbella</i>	276

List of charts

Chart C.1.1 Referrals 1876-98	30
Chart C 5.1 Caseflow management analysis	170
Chart C.5.2 Percentage of cases settled or disposed of before trial	173
Chart C.5.3 Percentage of cases tried withdrawn or transferred (Formula A)	176
Chart C.5.4 Percentage of cases tried to cases brought in (Formula B)	177
Chart C.5.5 Percentage of cases tried to cases referred (Formula C)	179
Chart C.6.1 Overall comparison	224
Chart C.6.2 Backlog analysis 1919-70	230
Chart C.6.3 Mean average analysis of backlog 1919-70	231

List of tables

Table T 1.1 Numbers of referees in post	32	✕
Table T.2.1 Rate of increase of actions 1859-66	41	
Table T.2.2 Rate of increase of actions 1868-69	41	
Table T. 2.3 Annual referrals 1876-98	60	
Table T 3.1 Amounts recovered	89	
Table T.4.1 Number of trials 1949-54	144	
Table T.4.2. Total referrals and trials	147	
Table T.4.3. Total cases withdrawn and disposed of and percentages of same	147	
Table T.4.4. Percentage of trials and disposals	148	
Table T.4.5. Average percentage of referrals resolved before and at trial	148	
Table T.4.6 Referrals, disposals and trials	149	
Table T.4.7 Average apportionments of referrals, disposals and trials	149	
Table T.4.8 Percentage of cases disposed of, tried and disposed to referrals	149	
Table T.5.1. Referral workload and average efficiency	159	
Table T 5.2. Trial workload and time spent	159	
Table T 5.3 Average trial times and trials per referee	161	
Table T 5.4 Backlog calculations	161	

Table T 5.5 Referrals	166
Table T 5.6 Trials	166
Table T.5.7 Settlements, disposals and transfers	168
Table T.5.8 Backlog	168
Table T.5.9 Increase in caseload	169
Table T. 5.10 Comparison of cases at beginning and end of research periods	170
Table T 5.11 Comparative periods 1919-27 and 1957-64	171
Table T 5.12 Comparison of trials, disposals and backlog 1932-38	175
Table T. 5.13 Highest trial efficiency pre-war	180
Table T. 5.14 Highest trial efficiency post-war	180
Table T 5.15 Formulae findings	181
Table T 5.16 Comparative average analysis	182
Table T 5.17 Average days sat per referee	184
Table T 5.18 Average time per trial	184
Table T 5.19 Referrals 1959-62	187
Table T 5.20 Expenditure of time	188
Table T 5.21 Notional time	188
Table T 5.22 Carter time recorded 1959-62	188
Table T 5.23 Carter's share of caseload	189
Table T 5.24 Carter's sittings 1959-62	189
Table T 5.25 Case type/time spent (Minute Books and notebooks) 1959-62	190
Table T 5.26 Case type time related analysis 1959-62	191
Table T 5.27 Referrals 1965-67	193
Table T 5.28 Expenditure of time	193
Table T 5.29 Average times per case	194
Table T 5.30 Walker-Carter turnover rates	194
Table T 5.31 Day sittings analysis	195
Table T 5.32 Case type/time spent Minute Books and notebooks	195
Table T 5.33 Case type/time spent (Minute Books and notebooks)1965-67	196
Table T 5.34 Case type time related analysis 1965-67	197
Table T.5.35 Usage of micro caseload management tools	201
Table T.5.36 Proportion of usage	204
Table T.5.37 Proportionate usage of caseload management tools	205
Table T.5.38 Average time per case	206

Table T.5.39 Hypothetical application	208
Table T.5.40 Micro-caseflow management elements 1959-62	211
Table T.5.41 Micro-caseflow management elements 1965-67	214
Table T.6.1 Newbolt/Richards comparison	226
Table T.6.2 Referral influx 1919-21	227
Table T.6.3 Rates of disposal before trial 1928-31	227
Table T.6.4 Rates of disposal before trial 1963-66	228
Table T.6.5 Number of referees' notebooks	234
Table T.6.6 Referees' caseload and value of cases	235
Table T.6.7 Summary of average annual caseload and disposals per referee	238
Table T.7.1 Comparative disposal rates	248

Table of statutes

Common Law Procedure Act 1854, s. 3
Chancery (Amendment) Act 1858, s.3
Supreme Court of Judicature Act 1873, ss., 56 and 57
Supreme Court of Judicature Act 1925, ss., 88 and 89
Supreme Court of Judicature Act 1894, s. 1(5)
Administration of Justice Act 1932
Administration of Justice Act 1956, s.15

Rules of the Supreme Court

1873 Rules of the Supreme Court 1873
r. 34 (Proceedings before an Official Referee)
r. 35 (Effect of the Decision of the Referee).
1875 Rules of the Supreme Court
O. 36 r. 2.
1883 Rules of the Supreme Court
O.36
O.36 r.19A
O. 37A
1957 Rules of the Supreme Court
O. 36A, r.1, r.2, r.5(2)
1996 Civil Procedure Rules

Amendments to Rules of the Supreme Court

RSC (No.1) 1933.

RSC (No.2) 1934

RSC (No.1) 1957

Annual Practice 1930

Notes on the practice before the Official Referee. pp. 640-641

Annual Practice 1955

Notes on Practice for Referees pp. 632 and 633.

Table of reported cases

<i>Albemarle Supply Company Limited v Hind and Company</i> [1928] 1 KB 307	61
<i>American Braided Wire Company v Thompson.</i> [1890] 44 Ch Div 274	63
<i>Anantapadmanabhaswami v Official Receiver of Secunderabad</i> [1933] AC 396	61
<i>Audley Land Company Ltd v Kendall</i> [1955] 1 WLR 639	222
<i>Baroness Wenlock v River Dee Company</i> [1887] 19 QBD 155	62
<i>Beaman v A.R.T.S.</i> [1949] 1 KB 550	61
<i>Bickerton v Northwest Metropolitan Hospital Board</i> [1970] 1 W.L.R. 607, [1967] 1 ALL ER 977 at pp.979, 989	220 269
<i>Biddell Brothers v E Clemens Horst Company</i> [1911] 1 KB 934	61
<i>Bradlaugh v Newdegate</i> [1883] 11 QBD 1	62
<i>Burrard v Calisher</i> [1878] 19 Ch Div 644	61
<i>Commercial Bank of Canada v Great Western Railway Company of Canada</i> [1865] 16 Eng Rep 112 1809-1865	30
<i>Cole v Kelly</i> [1920] 2 KB 107	61
<i>Cropper v Smith</i> [1884] 26 Ch Div 700	63
<i>Cruikshank v The Floating Swimming Baths Company</i> [1876] 1 CP 260	216
<i>Davies v Property and Reversionary Investments Corporation</i> [1929] 2 KB 223	61
<i>Dunkirk Colliery v Lever</i> [1878] 9 Ch Div 25	219
<i>Elder v Auerbach</i> [1950] 1KB 373	61
<i>Gathercole v Smith</i> [1881] 7 QBD 626	62
<i>Gyles v Wico</i> (1740) 2 Atk 141	43
<i>Hornby v Cardwell; Hanbury (Third Party)</i> [1881] 8 QBD 329	60
<i>Hulland v William Sanders & Son</i> [1945] KB 78	63
<i>Hutchinson v Gillespie</i> [1838] 12 Eng Rep 997 1809-1865	30
<i>Re Letters Patent No. 139,207, Re Carbonit Aktiengesellschaft</i> [1924] 2 Ch 53	63
<i>In re Married Women's Property Act 1882 Re, Humphrey and Humphrey</i> [1917] 2 KB 72	61
<i>In re Piers</i> [1898] 1 QB 628	60
<i>Jackson v Rotax Motor and Cycle Company</i> [1910] 2 KB 937	61
<i>Jebara v Ottoman Bank</i> [1927] 2 KB 254	61
<i>Jenkins v Bushby</i> [1891] 1 Ch 484	60
<i>Joshua Henshaw and Son v Rochdale Corp</i> [1944] KB 382	63
<i>Joyner v Weeks</i> [1891] 2 QB 31	60
<i>Kay v Field & Co</i> [1886] 10 QBD 241	63
<i>Lady de la Pole v Dick</i> [1885] 29 Ch Div 351	62
<i>Lascelles v Butt</i> [1876] 2 Ch Div 588	60
<i>Leigh v Brooks</i> [1876] 5 Ch Div 592	62
<i>Lowe v Holme and Anor</i> [1883] 10 QBD 286	63
<i>Marsh v James</i> [1889] 40 Ch Div 563	61
<i>Miller v Pilling</i> [1882] 9 QBD 736	62
<i>Ormerod and Others v The Todmorden Joint-Stock Mill Company (Limited)</i> [1882] 8 QBD 664	61
<i>Osenton v Johnston</i> [1942] AC 130	32 235
<i>Pirelli v Oscar Faber & Partners</i> [1983] 2 AC 1	122
<i>Porter v Tottenham Urban Council</i> [1915] 1 KB 778	63
<i>Potter v Jackson</i> [1880] 13 Ch Div 845	62
<i>Presland v Bingham</i> [1888] 41 Ch Div 268	60

<i>Proudfoot v Hart</i> [1890] 25 QBD 42	60
<i>Phillips v Homfray</i> [1883] 24 Ch Div 439	60
<i>Reigate v Union Manufacturing Company (Ramsbottom) Limited and Elton Cop Dyeing Co Ltd</i> [1918] 1 KB 592	62
<i>Rice v Reed</i> [1900] 1 QB 54	62
<i>Richards v May</i> [1883] 10 QBD 400	63
<i>Rochefoucauld v Boustead</i> [1897] 1 Ch 213	62
<i>Rockett v Clippingdale</i> [1891] 2 QB 31	63
<i>Rose and Frank Co v J.R. Crompton and Bros</i> [1923] 2 KB 271	61
<i>Rosenthal v Alderton and Sons</i> [1946] KB 375	61
<i>Rowcliffe v Leigh</i> [1876] 4 Ch Div 661	62
<i>Saxby v The Gloucester Wagon Company</i> [1881] QBD 305	63
<i>Strongman v Sincock</i> [1955] 2QB525	222
<i>Sutcliffe v Thackarah</i> [1974] AC 727	122
<i>T Tilling Limited v Dick Kerr & Co Ltd</i> [1905] 1 KB 562	60
<i>Tucker v Linger</i> [1882] 21 Ch Div 18	60
<i>Turnock v Sartoris</i> 43 Ch Div. 150 (1889)	60
<i>Union Bank of London v Ingram</i> 20 Ch Div 463 (1882)	60
<i>Victoria Laundry (Windsor) Ltd v Newman Industries Ltd</i> [1949] 2 KB 529	61
	137
<i>Woodbridge v Hilton</i> [1784] 28 Eng. Rep. 1202, 1557-1865	30
<i>Woolfe v Wexler</i> [1951] 2 KB 154	222

Table of Unreported cases

(B. Denotes page number in Bibliography)

<i>Agnew v Maycock</i> [1948] J.114/6 p.15 FR O70	99,203
<i>Re: a Lease of St Martin's Theatre London WC2 and re: Landlord and Tenant Act 1954 Bright Enterprise Ltd v Right Honourable Lord Willoughby de Burke</i> [1969] J.116/1 p.17 [CIMG 0163]	221
<i>A.G. Baxter(Stotfield)Ltd v J.S. Dunne</i> [1967] J.115/23 Case File	B.24
<i>A.T. Chown & Co Ltd v Peter Davis Investments Limited</i> [1962] J.116/1 p.290 [HPIM 2116]	37
<i>Adkins v Joseph Cade & Co Ltd</i> [1958] J. 114/34. p.87. [SH 10330]	140
<i>Albert Colegate v D Raymark (Married Woman)</i> [1949] J.114/6 p.181 [PRO II (FR) 082]]	B.36,56
<i>Alexander and Angell Ltd v F.C. Pilbean</i> [1968] J.115/28 Case File [CIMG 0117]	222,249.
<i>Allason & Others v Frankpile Ltd</i> [1963] J.114/41 p.263 [Dec 2006 Series; CIMG 0656]	B.4
<i>Allied Ltd v Peerless Representative (London) Ltd</i> [1947] J.114/3 p. 64 [HPIM1193]	151
<i>Alloy and Fibreboard Co Ltd v F Superstein</i> [1966] J.115/6 Case file: O.R. 56/1965. 1964. A. No. 799. [HPIM 2705]	112
<i>Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (Third Parties)</i> [1967] J.116/3 p.193 [Oct 2006 Series: SH101093]	120,253
<i>Barrow Brothers (Builders Lancaster) Limited v Haworth</i> [1962] J.116/1 p. 296. [CIMG 0200]	B.45
	132,214,236,
	246,251
	B. 48-49
	110,143,211,
	213. B.37,56

<i>Bedford Theatre (London) Limited v Brisford Entertainments Limited.</i> [1952] J. 114/21 p.246 [CIMG 0075-0076]	108,117
<i>Benoir Hamburges v Winifred Stort</i> [1948] J.114/5 [HPIM1232]	123,129,151, 152
<i>Beswarwick v. Woodbridge</i> [1953] J.114/28 p. 92 [Oct 2006 Series SH 101389]	107,145
<i>Bickley v Dawson</i> [1966] J.116/3 p.191 [Oct 2006 Series: SH101092]	121,214 B.57
<i>Bogen v Honneyball and Rossal Estates Limited</i> [1973] J.115/49 Case File. 1967. B. 2840. [HPIM 2749]	122,247 B.4
<i>British Electric Traction Co Ltd v Thomas Edwin Langton and Luxury Land Cruises Limited</i> [1959] J.116/1 p. 87 [CIMG0169]	221 B.26
<i>Burtain Ltd v J A Tyler & Sons Ltd</i> [1953] J.114/24 p.267 [CIMG 0571]	116,131,152 B.94
<i>Butler v Vaughan</i> [1957] J.114/35 p.128 [HPIM2780]	138,203,221
<i>Cecil v Ewell</i> [1948] J.114/1 p. 252	109,113,132
<i>Charlton Decoration Co Ltd v Robert Murray</i> [1950] J.114/16 p. 67 [HPIM2158]	126,151.B.67
<i>Clifton Shipways Co Limited v Charles Lane</i> [1960] J.116/1 p.104. [CIMG 0176]	111,150,118 211,247,249, 257. B.27
<i>Commercial Union v Collective Investments Limited</i> [1949] J.114/6 p.176 [FR O80]	113,117
<i>Cowley Concrete Ltd v Alderton Construction Co.Ltd.</i> [1966] J.115/1 Case File [HPIM 2685]	247. B.4
<i>Cruttenden v Philips</i> [1958] J.114/35 p.146 [HPIM 2784]	110
<i>Davidson Engineers v Stephens & Brotherton Ltd</i> [1951] J.114/19 p.57 [HPIM 1141]	137
<i>Dawes v Papdimitiou</i> [1952] J.114/24 p. 204 [CIMG0563]	131,202
<i>DNL Stepgamy Limited v Millicent (Birmingham) Limited</i> [1950] J.114/14 p.247. [CIMG 0089]	223
<i>Dorey & Son v Foster</i> [1950] J.114/14 p.288 [CIMG 0091]	135. B. 79
<i>Duke of Bedford v Augustus Faillie.</i> [1946] J. 114/2 p.166 [HPIM 1794]	108
<i>E S Moss Ltd v J Gremel</i> [1947] J.114/2 [HPIM 1796]	B.87
<i>Eaton Berry Ltd v King & Anor.</i> [1965] J.116/3 p.65 [Oct 2006 Series:SH101045]	202. B.44
<i>Extol Engineering Ltd v.The British Process Mounting Co (a firm) and Andrews Houseware Manufacturers Ltd</i> [1965] J.116/2 p.283. [Dec 2006 Series SH101784] and see J114/45 p. 210 [Dec 2006 Series CIMG 0736]	140,203,214 B.40
<i>F Goff & Sons Limited v Bently Golf and Country Club Limited</i> [1974] J.115/56 Case File. [CIMG 0127-130]	133
<i>Frederick Baden Powell Weil v John Southern</i> [1951] J.114/17 pp. 189 and 199 [SH 101132-101134]	114,145,201
<i>Frederick William Young v Charles William Connery</i> [1965] J.116/3 p.1 [Oct 2006 Series: SH101015]	140,203,215
<i>G Swindon & Co Ltd v William Franklin Stirling Car Hire Services Limited, Launderette (High Road) Limited, Launderette (Boreham Wood) Limited</i> [1959] J.116/1 [CIMG 0168]	B.26
<i>George Osbourne Limited v E.C. Goddard</i> [1950] J. 114/14 p.125 [CIMG 0086]	142

<i>George v Russell Bros (Paddington) Ltd</i> [1958] J.114/35 p.223 [HPIM2800]	138
<i>George v. Russell Bros (Paddington) Limited</i> [1960] J.116/1 p.96 [HPIM 2010]	139,212 B.27,111
<i>Gloucestershire County Council v Henry William Richardson (Trading as W.J. Richardson & Son) and Ocean Accident and Guarantee Corporation Limited.</i> [1966] Case File [HPIM 2733]	141,142,153 B.4
<i>Great Western Railway Company v Port Talbot Dry Docks.</i> [1944] J.114/1[HPIM1735]	111 B.114
<i>Harper and Preston Limited v Marshall Castings Limited</i> [1961] J.116/1 p.170 [CIMG 0184.]	143,212 B.31
<i>Harris v Mac Rex Foods Limited.</i> [1946] J.114/2 p. 92 [HPIM 1787 - HPIM 1789]	96,106
<i>Harris v Rex Foods</i> [1946] J.114/3. p.56 [CIMG 034.]	96,106
<i>Hayland v Springet & Son</i> [1951] J.114/21 p.1 [CIMG 0061-0062]	115,131 B.60
<i>Hiauco Limited v Tauford & Co Limited</i> [1950] J. 114/14 p.74 [CIMG 0079-0080]	114
<i>Hon. Mrs Courtney Cecil Fem Sol v D Ewell (Spinster)</i> [1948] J.114/4 p.172 [HPIM 1779]	109,132,152 B.85
<i>Irvin & Sons v Blake</i> [1952] J.114/24 p.108 [CIMG0546]	116 B.20
<i>J C Robertson & Sons (a firm) v House</i> [1952] J. 114/21 p. 213 [CIMG 0074]	135,203 B.61
<i>J.H. Plant Ltd v Smithson</i> [1946] J.116/1 p.105 [Oct 2006 Series: HPIM 2015]	131 B.27
<i>Jack Hyman Sockel v Isaac Francis Salmon Matthew Francis</i> [1950] J.114/15 p.179 [CIMG 0466-68]	135,142 B.63
<i>James Conlon T/a J Conlon & Sons v Lloyds (Builders) Limited</i> [1952] J. 114/21 p.64[CIMG0063]	115,201 B.36
<i>James Kinross v R H Tarrant</i> [1960] J. 116/1 p.107 [CIMG 0178]	119,202,211
<i>Jayes Limited v Home Foods Limited.</i> [1967] J.114/6 pp. 67-105. [FR 072-074]	97, 202
<i>Jays (Engineers) Ltd v Housegoods Limited.</i> [1949] J.114/6 p.79 [PRO II (FR074)]	130,202, 223
<i>John Fletcher Suter v W Pikta</i> [1961] J.116/1 p.186 [CIMG 0188]	128,202,212
<i>Johnson v Johnson</i> [1946] J.114/1 21 p. 63 [HPIM 1746]	90
<i>K. Cross (Doncaster) Ltd v County Council of York (East Riding)</i> [1966] J.116/3 p.172 [SH101085]	141,215 B.47
<i>Kefford v Brownleader</i> [1953] J. 114/21 p. 258 [CIMG 0077]	117 B.61
<i>Knibbs v Goodhale Engineers Ltd</i> [1952] J.114/19 p.255 [HPIM 1177]	137 B.78,81
<i>La Planche v Newman</i> [1952] J. 114/21 p. 184 [CIMG 0068-0070]	223 B.60
<i>Leighton v Tait & Alt</i> [1966] J.116/3 p.189 [Oct 2006 Series: SH101091]	111, 214 B.47
<i>Lenton v City of Coventry</i> [1960] J.116/1 p.136 [HPIM 2030]	140 B.29
<i>Leon v Beales</i> [1962] J.116/1 p. 245 [CIMG 0192] 7 February 1962	124,151,211 B.34-35
<i>London and Canterbury Motors (A Firm) v B L Koppen</i> [1947] J.114/3 p.67 [HPIM1195]	112,129,152, 201, 202 B.82
<i>Louis Obermenter v Rodwell London & Provincial Properties Ltd</i> [1966] J.116/3 p.139 [SH101074]	246 B.45
<i>M & L Transport (a firm) v Horricks</i> [1960] J.116/1 p.93 [CIMG 0170]	223

<i>Martin French v Kingswood Hill Ltd</i> [1959] J.116/1 p.6 [HPIM1964]	118,140,202 203,212,249
<i>McConnell v Grant</i> [1957] J.114/35 p.128 [HPIM 2780]	139, 203 B.109
<i>Middleton v Blackwell</i> [1965] J.116/3 p.13 [CIMG 0096]	138,143,214 B.42
<i>Modern Telephone Company v Pickering</i> [1947] J.114/2 p.168 [HPIM 1795]	113
<i>Moresq Cleaners Limited v Hicks</i> [1966] J.116/3 p.163 [CIMG 0110]	143,215
<i>Mory & Co Limited v Regan Brothers (Haulage) Limited</i> [1965] J.116/3 p. 25 [CIMG. 0098]	221 B.42
<i>Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and Nathan Bernard and Ruth Bernard</i> [1962] J.116/1 p.269 [CIMG 0195]	257 B.123
<i>Newbold v George Davies (Haulage) Limited</i> [1966] J.116/3 p.127 [CIMG 0108] 24 March 1966	221 B. 45
<i>Olga Hilditch (Widow) v Charles E.H. Durham and A E L Durham(Married Woman)</i> [1967] J 116/4 p.19 [Dec 2006 Series: SH 101810]	141 B.50,58
<i>P.C.S. Ltd v Lewer</i> [1954] J.114/31 p.32 [SH 101190]	138 B.96
<i>Palmers Hebburn Company Limited v The Grimsby Steam Fishing Vessel Mutual Insurance and Protecting Co Ltd and Shire Trawlers Ltd</i> [1951] J.114/16 p. 96 [HPIM 2172]	130 B.68
<i>Parkwood Engineering Co Ltd v Carlington Engineering Ltd</i> [1961] J.116/1 p.216 [Oct 2006 Series: HPIM 2072jpg]	140,203,212 B.33
<i>Pepper & Co Ltd v Harry Green Ltd</i> [1951] J.114/19 p. 2 [HPIM 1125]	136,142,203
<i>Phillips v Ward</i> [1955] J.114/35 p.8 [HPIM2763]	126,202, B.108
<i>Plaehet v Stormond Engineering Corporation Limited.</i> [1949] J.114/8 at p. 205	99,203
<i>Plant Machinery v HP Thomas Limited</i> [1960] J. 114/2. p.93 [HPIM 1790]	96
<i>Praills Motors Ltd v Hills Bros & Mussell</i> [1953] J.114/28 p.1[SH 101372]	142
<i>R. Corben & Son Ltd v Forte (Olympics)</i> [1962] J.116/1 p.242 [HPIM 2088]	123,202 B.34
<i>Ridley & Ors v Kopisitzer</i> [1958] J.114/35 p.197 [HPIM2794]	131,202 B.111
<i>Rowlett v Champion</i> [1947] J.114/1 p. 97 [HPIM 1766]	112
<i>S Kaplin & Son (Upholsterers) Limited v Parkins</i> [1959] J.116/1 p.1 [HPIM 1963] also: [CIMG 0160; and SH 101353]	110,201,211 B.123
<i>S.J.C. Duqueim v Atlas Assurance Company Limited</i> [1946] J.114/3 p.130 [CIMG 0037-0039]	107 B.60
<i>Sergeious Papa Michael v A K Koritsas</i> [1961] J.116/1 p. 207 [CIMG 0190]	211
<i>Sheering v Wisehill Field Company Ltd</i> [1966] J.116/1 p.283 [HPIM 2113]	212
<i>Shopfitting Centre Ltd v Revuelta</i> [1962] J.116/2 p.5.[SH 101775]	132,202,212 B.37
<i>Swallow Prams Limited v United Air Coil Limited</i> [1967] J. 116/4 p.35 [SH 101818]	141,203,215 B.51

<i>Sydney Smith Black Mobile Coaches Limited v J F Anderson (Male)</i>	223
[1948] J.114/4 p.156 [CIMG 0058]	B.60
<i>T J Kendel & Co v ATA Scientific Progress Ltd</i> [1951] J.114/16 p.133	139
[HPIM 2186]	B.70
<i>Titler v Brown & Another</i> [1956] J114/35 p.100 [HPIM 2771-2773] and	221
[CIMG 0089]	B.108
<i>Townsend Builders Ltd v France</i> [1962] J.114/41.p.180. [Dec. 2006	211
Series CIMG 0638]	B.36
<i>United Dominions Trust (Commercial) Ltd v Thomas Gravell & Prized</i>	143
<i>Steele Garage Ltd</i> [1966] J.116/3 p.99 [SH101055]	B.45
<i>Van Nuffelen v Leicester.</i> [1952] J. 114/21 p.65 [CIMG 0067]	116 B.60
<i>W H Armfield Ltd v John England Perfumers</i> [1950] J.114/19 p.82	134
[CIMG 0456]	B.63
<i>W J Barrs Limited v Thomas Foulkes</i> [1965] J.116/3 p.49 [CIMG.	150,214,247
0102]	B.43
<i>W J Gray & Sons v Royal Mail Lines Limited</i> [1946] J.114/3 p.157	202
[CIMG 0041]	B.60
<i>Webbs Asphalt Roofing & Flooring Co Ltd v Roper & BRM Shopfronts</i>	111,201,214
<i>(A Firm)</i> [1966] J.116/3 p.125 [CIMG. 0106]	B.45,57
<i>Westheath Contractors v Borough of Grantham</i> [1945] J 114/2 p. 1 [FR	112,125,220
031-037]	B.113
<i>William George Mellie v Mrs A Mellie (Married Woman)</i> [1947]	109
J.114/4 p.112 [HPIM1217]	B.84
<i>Wilson v Crac</i> [1952] J.114/20 p.169 [HPIM1776]	116 B.81
<i>Wilson v Eastern Counties Farmers Cooperative Association Ltd</i>	138,142
[1953] J.114/28 p.15 [SH 101376]	
<i>Zenith Skin Trading Co Ltd v Frankel</i> [1947] J.114/4 p.121 [1947]	96,106,129
[CIMG 0049]	

Bibliography	
Parliamentary Papers and Reports	1
Civil Judicial Statistics	2
House of Commons Debates	2
National Archive Materials	3
Papers of Roundel Palmer, Lord Selbourne	6
Books	6
Reference Books	7
Journals	7
Newspapers	9
Correspondence	10
Appendices	11
Chronologies	14
Sample <i>Return of Judicial Statistics 1880</i>	19
Data Collection: Official Referees' Notebooks and Minute Book records	22
Statistical data spreadsheets	126

The true function of the court, it is submitted, is especially in commercial cases under consideration, not to conciliate or exhort the parties, as is sometimes suggested, much less to hurry them, or to deprive them of perfect freedom of action, but to use the available machinery of litigation to enable them to settle their disputes according to law without grievous waste, and unnecessary delay and anxiety: and in particular to show them how this, if desired, may be accomplished. The only so-called concessions which the parties can be said to make are made not only voluntarily, but in their own direct pecuniary interest. This has little, or nothing, to do with the common-place saying of ordinary life that a man loses nothing in the long run by forbearance, fair dealing, or generosity.

Sir Francis Newbolt²

CHAPTER 1

A STUDY IN RUDIMENTARY CASEFLOW MANAGEMENT

1.1 Incipient micro-caseflow management

This study makes the large claim that micro-caseflow management was practised by the Official Referees³ in the early part of the twentieth century decades before the 1996 civil justice procedural reforms. In it we also discern the judicial sponsorship of settlement as advocated and practised by Sir Francis Newbolt⁴ and his colleagues in that court. Such study may lead us to draw wider conclusions in the context of civil justice.

This thesis seeks to establish that a rudimentary case management regime was practised in this court as early as the 1920s. This was long before other courts and jurisdictions experimented in these interlocutory practices, although the process of preliminary issues was advocated as far back as 1867 in the *First Report of the Commissioners*.⁵ Two facets of caseflow management are explored at micro and macro-level. Micro, in the context of how the referees managed their work more effectively and efficiently, and macro in the sense of how the Judicature Commission and the superior judiciary facilitated the more efficient delegation and disposal of business.

This study concerns two significant periods in the evolution of micro-caseflow management in that court: 1919-38, and 1947-70. Within this second period a more detailed forensic study is focussed upon the years 1959-62 when the court's Minute Books provide the first definitive evidence of time expended. That is supported by a further detailed study of the years 1965-67. Whilst there is some empirical evidence of rudimentary caseflow management in the Lord Chancellor's Office files, and in the

² F. Newbolt, 'Expedition and Economy in Litigation' (1923) 39 LQR 440.

³ Official Referee(s) hereafter referred to as "referee(s)." The "court" is the Official Referees' court unless otherwise indicated.

⁴ K.C. 1914; Hon. R.A.; J.P., M.A., F.C.S., A.R.E. Hon. Professor of Law in the Royal Academy. Publications included: *Sale of Goods Act 1893*; *Summary Procedure in the High Court*, and *Out of Court*. Official Referee 1920-1936.

⁵ Parliamentary Papers. *First Report of the Judicature Commissioners* [Session 10th December 1868 -11 August 1869] (No. 41340) Vol. XXV. March 25, 1869. p.13. para.5

contemporaneous judicial records of the court itself, as well as in an article authored by its chief exponent, Sir Francis Newbolt,⁶ in *The Law Quarterly Review*, there is little evidence of it in the official law reports. After Newbolt's retirement the practice evolved through his successors Sir Tom Eastham QC,⁷ Sir Walker Carter QC,⁸ and Sir Norman Richards QC⁹

1.2 Caseflow management and theory

Caseflow management in this context is synonymous with what is identified in Chapter 3 as Newbolt's "Scheme." This has two principal manifestations. The first is the activist approach involving a more robust stance of judicial management demonstrated by judicial intervention at interlocutory and trial stage. The clearest demonstration of this was where Newbolt led settlement discussions in chambers. The second manifestation is a more traditional role, a passive approach, with the referee being non-interventionist during the interlocutory and trial stages. In the latter, the parties manage progress, but the referee facilitates resolution by granting adjournments or stays to assist settlement discussions between the parties. These approaches are illustrated by case studies and examples in Chapters 3 and 4 covering the pre and post-war eras.

We need to be clear that Newbolt's "Scheme" was a self-conscious scheme; he invented it. This is confirmed in his report to Lord Birkenhead¹⁰ dated 5 July 1920, and in his seminal article¹¹ as well as other evidence analysed in Chapter 2. He clearly believed in the efficiency of his "Scheme" from which my theory of micro-caseflow management emanates.

1.3 Purpose of research study

The central purpose of this study, confined to the research periods, is to consider the origins and evolution of caseflow management in this court and the various devices associated with it in bringing about a more expedient process. The study also considers those involved and why it was invented. It gives an explanation as to the origin of a form of caseflow management in England in the 1920s, and describes the interlocutory procedural devices used by the referees from that time. The process or "Scheme" is analysed in Chapters 3, 4, and 6 and examined in quantitative terms in Chapter 5. The

⁶ n.2.

⁷ 1936-1954.

⁸ 1954-1971.

⁹ 1963-1978.

¹⁰ LCO4/152. HPIM 561-567 and CIMG 0008

¹¹ n.2.

latter demonstrates a time saving where it appears to have been applied. Newbolt and his colleagues (like arbitrators) could only use such devices where the parties consented. Incidents of caseload management are illustrated in the cases of Newbolt, Eastham and Carter in varying degrees, and whilst Newbolt's reports and writings confirm the existence of the "Scheme," no contemporaneous judicial records (notebooks or Minute Books) of his time have survived the war. On the other hand, there is a considerable amount of archival material of his successors that survives as described below.

1.4 Importance and Interest

The "Scheme" is important in understanding to what extent appropriate caseload management can be effective at a subordinate judicial level and in ascertaining the relationship between informal and formal dispute resolution in a court setting. It is important for other reasons because:

1. It demonstrates macro-caseload management by judicial delegation and the advantage of a subordinate judge;
2. It shows the benefit of informal proceedings at an interlocutory stage with a subordinate judge who understands the issues in the case. Such judge may act as a facilitator promoting earlier settlement with party consent and without unnecessary waste of time or money in certain cases;
3. It demonstrates how time and costs may be saved by an interventionist (activist) and a non-interventionist (passive) approach to the case.
4. It considers the relative success of the "Scheme" in qualitative and quantitative terms;
5. It analyses the relative success of the "Scheme" in qualitative and quantitative terms;
6. It synthesises the study with recent trends in civil justice and ADR.

The hypothesis in favour of efficient referee caseload management is of particular interest in the context of the times. Newbolt wrote his report in 1920. This was eight years before a justice of the Municipal Court in New York wrote about his attempts at conciliation and mediation in court in the mid 1920s.¹² Newbolt was not undertaking the same activity as Justice Lauer. He was not conciliating or mediating at trial stage, but facilitating settlement at the first summons for directions hearing.

¹² Lauer, 'Conciliation-A Cure for the Law's Delay,' 156 ANNALS 55 (1928)

Here we trace the origin of caseload management in England and consider Newbolt's model "Scheme" for earlier resolution. Our analysis juxtaposes the implementation of informal and formal management methods extending the judge's traditional non-interventionist role. It is argued that cases were resolved more efficiently because of the subordinate status of the referee's office which enabled informal "discussions in chambers."¹³ This would be difficult for a High Court judge who could be criticised for compromising his independence. In any event the High Court judge had no real procedural opportunity for this because he did not give directions for trial. The "Scheme" was operable at the first summons for directions stage after referral from a master or High Court judge because the pleadings would be closed and all material issues identified.

Such discovery of early caseload management is of importance and interest to all those interested in civil justice reform. This is because the traditional perception of the English High Court judge before 1996 was that he did not enter the arena or the debate between the parties.¹⁴ He was not a manager of the process, or an interventionist. He was not concerned with settlement, or with interlocutory matters before trial. He remained aloof, symbolised by his elevated physical location in the courtroom itself. There could be no suspicion of bias; the judge had to be seen to be independent. Thus, we may argue that a subordinate judge, operating a more informal process, through Newbolt's "discussions in Chambers," might be less prone to such suspicion, and, more importantly, resolve cases quicker and more cheaply. Newbolt's "Scheme" and this study therefore questions our perception about a judge's role and what it should be.

There were differing views about the status of the referee.

Roland Burrows described them as:

.....subordinate officers (who) have developed into judges of important actions.¹⁵

On the other hand, Newbolt claimed:¹⁶

.....we are High Court judges in all but name, dealing with actions of great complexity and importance. I have already tried a case involving a claim for £106,000 this term and have another shortly to be tried involving £80,000.....

¹³ n.5 p. 438.

¹⁴ Lord Woolf's *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*. p. 299. (London. Stationery Office, July 1996)

¹⁵ Burrows, Roland *Official Referees* (1940) 56 LQR 504-513 at p. 506.

¹⁶ LCO 4/152 Newbolt to Schuster 1st April 1923. [HPIM 0637]. As may be discerned from the subsequent analyses in Chapters 4, 5, and 6 as well as the appendices such heavy cases appear to have been the exception and not the norm. Sir Claude Schuster was the Lord Chancellor's Permanent Secretary (1915-44) and Clerk of the Crown in Chancery (1944-54).

or, as Eastham argued in his Memorandum:¹⁷

The work done by the Official Referees is only comparable with that done by High Court Judges when trying long non-jury actions and it is more difficult, important and requires more legal experience (all these Official Referee's are King's Counsel of at least 10 years standing) than the work of County Court Judges, Stipendiary Magistrates, Masters of the High Court and Registrars in Bankruptcy.

And subsequently Sir Brett Cloutman's expressed the view:¹⁸

The truth is that for half a century or more he has not been a referee at all, but a judge of the heaviest cases in contract.

The referee's role was exceptional for the reasons explained in Chapter 2 embodying a combination of functions resembling:

- a jury in giving a verdict;
- a master in dealing with interlocutory issues,
- an arbitrator in acting with the parties consent,
- and a judge in conducting the hearing and giving judgement.

He was a quadri-functionary created by the Judicature Commissioners who were influenced by a number of factors described in Chapter 2. As *The Times* reported the referee was "one of the most striking novelties in the Judicature Act of 1873."¹⁹ Yet the referees had what Edgar Faye termed "an inauspicious start."²⁰

The utility of the office did not really emerge until Newbolt's time and the acquisition of the Queen's Bench non-jury list. This sudden heavy influx coincided with Newbolt's innovations. He was able to effectively manage interlocutory and trial process. Interlocutory process was more effective because of the commercial approach adopted by solicitors who readily appreciated the benefit to clients of earlier settlement.

It is contended in Chapter 5 that the "Scheme" may have been used in up to a quarter of all referrals.²¹

1.5 Hypothesis

The hypothesis is that the invention and evolution of a rudimentary caseflow management and consensual interlocutory process made referees more effective. This is demonstrated in Chapters 3 and 4 by examples of Newbolt's activist style compared to Eastham's passive approach. We also discern an amalgam between the two facets of

¹⁷ LCO 4/417. [HPIM 0938]

¹⁸ Official Referee (1948-63) LCO 2/7739 [HPIM 0814] Memorandum citing Order 36A Rule 7 RSC

¹⁹ *The Times* May 29, 1876; p. 11; Issue 28641; col A.

²⁰ E.Fay, *Official Referees' Business*. p.17. (London: Sweet & Maxwell, 2nd ed, 1988)

²¹ See paragraph 5.9.3. and Table T 5.39

macro and micro caseflow management inherent in the organisational reforms of Selbourne and Cairns, and the Newbolt “Scheme.” The latter having two manifestations: the traditional and more passive approach as demonstrated at times by Eastham and Carter, and again, the activist approach of Newbolt and also of Carter considered in Chapters 3 and 4.

The hypothesis is further demonstrated by quantitative and qualitative analyses and literature reviews in other chapters. The underlying concept here is that the referees developed their own judicial culture in dealing with complex technical cases making their practice distinctive facilitated by their unique function and role in the High Court.

1.6 Research questions

To test the hypothesis that the invention and evolution of a rudimentary caseflow management and consensual interlocutory process made referees more effective, we address the following research questions:

- (a) why the office of referee was invented and what caused and facilitated case-flow management?
- (b) what was Newbolt’s “Scheme”, and what were the reasons for his application of this rudimentary form of case management?
- (c) what was the impact of such “Scheme” according to a literature review of the archival materials that survive, and what conclusions can be drawn?
- (d) to what extent did Newbolt’s “Scheme” promote expedition and economy in the court’s work?
- (e) to what extent, if at all, did the referees promote settlement and save costs?
- (f) what was the impact of this “Scheme” as ascertained by qualitative and quantitative analysis of *Judicial Statistics* and the original court records?

1.7 Use of research

This research examines the effectiveness of the “Scheme.” Its value lies in its challenge to the traditional view of the judge’s role in litigation: that it is no part of the judge’s duty to be involved in settlement. In the English adversarial system it was for the parties to present and prove their respective cases. If they chose to settle it was a matter for them. In that system little attention was paid to the judge’s case management role save some debate from time to time as to comparisons with the inquisitorial system and

interventionism. At the time of Evershed²² it was thought that “a robust summons for directions” would resolve matters more quickly. But generally case management was unknown in England. Thus, this discovery may come as some surprise. The findings are of considerable interest in the context of what has now been introduced right across the court system without knowledge of this. The research highlights the role of an inferior judge and the advantage that enjoyed; indeed it may provide a role model. It thus indicates a secondary theme as to the role of the judge in relation to settlement and possibly suggests a way forward without giving offence to the concept of judicial independence. Newbolt’s singular achievement seems to be that he was able to facilitate settlement without compromising the procedural or substantive legal rights of the parties either procedurally or substantively. There is no record of any referee ever being appealed in relation to, or any critique of the “Scheme.” Whilst Chapter 3 considers the understandable reserve of Lord Birkenhead such reservations did not restrain or prohibit Newbolt’s practices. The “Scheme” should not therefore be seen as an impediment to justice, or an abuse of judicial process.

We conclude that the use of the research is to allow us to consider what a judge is and what he ought to be in the context of caseload management.

1.8 Evolution of the referee

This study traces the evolution of the referee over the course of a century from 1867 to 1967. In naming the new court officer a “referee” the Judicature Commission deliberately invented a new subordinate judge that would enable High Court judges to function more effectively. At macro-level, the referees reduced the High Court caseload and backlog. At micro level, they revolutionised the judicial process inventing a rudimentary form of caseload management. An essential ingredient of that was their active involvement in earlier resolution. They, in particular, Newbolt, shifted the focus from trial to informal case management resolution which is analysed in Chapters 3 and 4. Such development at micro level might not have been foreseen by the Commissioners, but there were lessons learned from the pre-1873 role of a referee that suited their objectives.

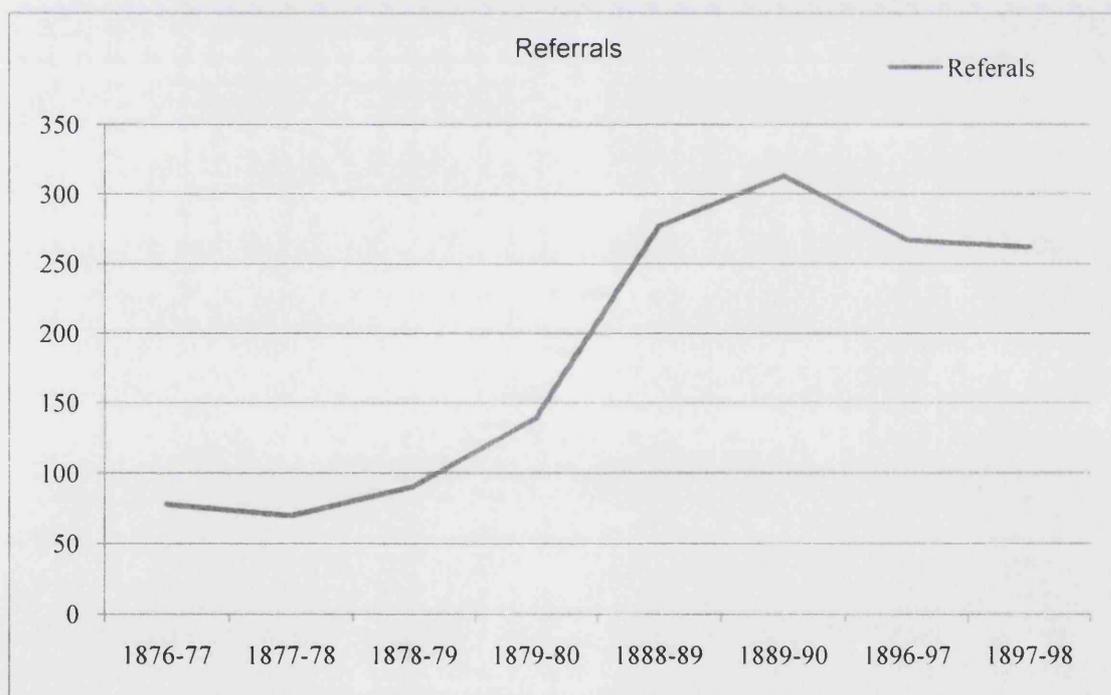
²² *Final Report of the Committee on Supreme Court Practice and Procedure*. July 1953 (Cmnd. 8878). This had been appointed on 22 April 1947 under the chairmanship of Sir Raymond Evershed subsequently Master of the Rolls to enquire into the practice and procedure of the Supreme Court and to consider what reforms should be introduced for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business.

That earlier role dated from the eighteenth century where matters of detail or account “ad computandum” were referred to a master or an arbitrator. *Woodbridge v Hilton*,²³ was one of these early referrals to an arbitrator to settle “all differences save costs.”

References were made under the Common Law Procedure Act 1854 and in the Court of Chancery²⁴ described in Chapter 2. There were references from the Judicial Committee of the Privy Council in cases such as, *Hutchinson v Gillespie*,²⁵ and in *Commercial Bank of Canada v Great Western Railway Company of Canada*²⁶ in 1865, where counsel included Sir Roundell Palmer, and Sir Hugh Cairns with Lord Chelmsford presiding. Interestingly all three were involved in the creation of the referees’ office which in itself provided an excellent example of the blending of Chancery and Common Law practice, a principal feature of the Judicature Acts.

The first referees were appointed under Section 83 Judicature Act 1873. The Act invested the referee with the powers of a High Court judge giving referees more teeth than the prior legislation or Chancery practice. We can see in ~~Table~~ **Chart C.1.1** below how their jurisdiction grew with referrals increasing from under 100 in 1877 to over 300 in 1890.

Chart C 1.1 Referrals 1876-98



Source; *Returns of Civil Judicial Statistics 1876-98*

²³ 28 Eng. Rep. 1202 1557-1865

²⁴ Other cases included the referral to a County Court judge having High Court powers. *Re: Anna Booth*. 5 C.B. (N.S.) 539. p.218. Costs were taxed on High Court basis per Crowder.J.

²⁵ 12 Eng. Rep. 997 1809-1865.

²⁶ 16 Eng.Rep. 112 1809-1865.

A steep rise in the 1880s coincided with substantial amendments to the *Rules of the Supreme Court*. Order 36 dealing with referees was amended giving them power to hold trial at any place,²⁷ order discovery and production of documents,²⁸ order costs at interlocutory and judgment stages,²⁹ and significantly a power to give orders on directions after reference.³⁰ It was that power that enabled Newbolt to initiate his innovative chambers discussions as described in Chapter 3.

In 1888 referees were permitted to transfer cases between each other³¹ and in 1889 the Senior Official Referee³² was required to make a return of cases to the Lord Chancellor and Lord Chief Justice so that work could be monitored. In 1893 referees were empowered to inspect property, an important caseload management tool.³³ The Judicature Act of 1894 provided that appeals lay to the Divisional Court. In 1900 the referees moved premises from their chambers in Portugal Street to the West Wing of the Law Courts.

In 1920 a dynamic era of procedural innovation began when Lord Birkenhead appointed two referees: George Scott and Francis Newbolt, who joined Sir Edward Pollock. Their appointments were practically coincidental with the acquisition of the non-jury Queen's Bench list which trebled the workload of the referees in the two years from 1919 to 1921. Such a sudden and steep rise in caseload necessitated the invention of a more efficient working system in the form of the "Scheme." Scott invented his "Scott" or "Scott's schedule" as Eastham called it. This document summarised the pleadings in terms of: the items in dispute, their value, description of the contract or the works, the remedial work and its cost with columns in the schedule for the parties' comments and the referees' decision. This device facilitated early settlement by defining the issues of fact and quantum and may be considered an element of the "Scheme."

It is arguable that the referees' profile was raised by Section 1 Administration of Justice Act 1932 enabling appeals to the Court of Appeal on a point of law only, circumventing the Divisional Court, so that appeals from the referees were to Lords Justices of Appeal

²⁷ Order 36 Rule 48. RSC 1883.

²⁸ Order 36 Rule 50. RSC 1883

²⁹ Order 36 Rule 5. RSC 1883 (Dec. 1899)

³⁰ Order 30 RSC 1883. Referees gave directions soon after the referral.

³¹ Order 47A RSC 1883.(Dec. 1888)

³² The Senior Official Referee was so called because he was the most senior serving referee. He had no particular authority over the other referees save that his clerk on his advice allotted cases by the rota.

³³ *McAlpine v Calder* [1893] 1 Q.B.545

and not to High Court judges.³⁴ This resulted in a temporary loss of professional negligence actions as there was no appeal on a matter of fact.³⁵ This however was subsequently restored under Order 58 r.4 (1) *Rules of the Supreme Court*.³⁶

In 1938 referees were accorded the title of “Your Honour” following concern by Newbolt and his colleagues over status and ranking below County Court judges. The establishment of four referees in 1873 was reduced to three in 1889 and further reduced to 2 in 1932 as in Table T.1.1.

Table T 1.1 Numbers of referees in post

1919-31	1932-42	1943-47	1948-56	1956-70
3	2	3	4	3

Source: *Official Referees' Business*³⁷

Diminution in manpower in the periods 1932-42 (from 3 to 2 referees) and 1956-70 (from 4 to 3 referees) was a critical factor, despite evidence of rudimentary caseload management activity. These reductions took place at times when referrals were increasing the pressure on the referees to be more efficient. This increasing jurisdiction is more particularly described in chapter 2 and their effectiveness analysed in chapter 5. Whilst the Evershed Committee made a number of recommendations in the early 1950s it did not recommend an upgrade in the referees' status to that of High Court judge. The reason was that Sir Tom Eastham Q.C in his evidence to the committee advised against such change. The Committee stated:³⁸

We are satisfied that the Official Referees fill a very useful function in particular types of case and that a change in their status would bring about no advantages to the litigant and would not achieve any saving in costs. We therefore recommend no change in this respect.

It is significant that the Committee considered there would be no advantage to the litigant here. Whilst the referees' wanted to abolish referrals for enquiry and report under Section 88 Judicature Act 1925 the Committee favoured the widening of jurisdiction for “convenience, economy, expedition or otherwise.” but would not recommend the abolition of enquiry and report, because of the advantage to the litigant.

³⁴ *Rules of the Supreme Court (No.4), 1932; Appeals from Official Referee's Order, 1932.* Appeals on points of law could be brought against an interlocutory order or judgment of the referee. *Conway (Theo) Ltd v Henwood* (1934) 50 T.L.R. 474, C.A.

³⁵ *Osenton & Co v Johnson* [1942] AC 136 where the House of Lords decided that a party could be deprived of a right of appeal in the event of an error of fact by the referee.

³⁶ Permitted such an appeal on a question of fact involving a charge of fraud or a breach of professional duty and then further to permit an appeal on a matter of fact with leave of the referee or the Court of Appeal.

³⁷ n.22 p.162.

³⁸ *Second Interim Report of the Committee on Supreme Court practice and Procedure.* March 1951. H.M. Stationery Office, London. Cmd.8176 p.39 para. 105.

The implication in both cases was that a subordinate judge might affect resolution more quickly and cheaply than a High Court judge.³⁹ After Evershed, the most significant change was the abolition of the office of the Official Referee in 1970 under the Courts Act 1971 following the recommendations of the Beeching Report.⁴⁰ Under this statute referees became circuit judges.

1.9 Limitations on research

This study has been constrained by the surviving contemporaneous documentary records of the periods 1867-87 and the main study periods of 1919-38 and 1947-70. References are made to the *First Report of the Commissioners*, and to correspondence with various Lord Chancellors' Secretaries. This work was principally sourced from the National Archives, with documentation from the British Library, BLPES, *The Times* archive, *Judicial Statistics*, the Law Reports and Journal publications. It focuses on Newbolt, his contemporaries and his successors. The following archive series were examined at the National Archives:

<u>Prefix/reference</u>	<u>Title</u>
L.C.O.	Lord Chancellor's office files and reports 1875-1971.
J. 114.	Official Referees' notebooks 1944-84.
T.	H.M. Treasury Records
P.R.O.	Domestic Records of the Public Records Office.
H.O.	Home Office records.

The essential evidence upon which this study is based is recorded in a digital archive of approximately 3,850 documents in the HPIM, CIMG, S.H., A, and I.M. digital camera series taken by the author at the National Archives in Kew between 2003 and 2006. It comprises: 23 Lord Chancellors Office files,⁴¹ 6 files of records of the Supreme Court of Judicature and related courts; 5 Home Office files, 2 Treasury files, 54 Notebooks of Sir Tom Eastham, Sir Kelly Walker-Carter and Sir Brett Cloutman V.C, QC and three Minute Books.

The Lord Chancellor's files ("L.C.O." Series) cover the periods between 1921 and 1971 and relate to matters of jurisdiction, appointments, salaries, duties, powers and status, whilst the J series contain a random sample of case files, judges notebooks and minute books. The notebooks extend over the period 1944-84; case files from 1962, and Minute

³⁹ n.38 p.40 paras. 108-9.

⁴⁰ *Report of the Royal Commission on Assizes and Quarter Sessions 1969* (Cmnd. 4153)

⁴¹ *The National Archives*. Catalogue Search: 16th July 2006.

Books from 1959. None of the judges' notebooks or personal records of the pre-war period survive, neither does there exist any *Judicial Statistics* for the wartime period and the immediate post-war period to 1946. These materials appear in categories J.115, J.116, and J.114. These materials are not comprehensive.

It was only in 1974 when Lord Denning enquired into the state of these records as Superintendent of the Public Records Office that the referees were asked to retain their records for a specified time.⁴² The principal research has therefore focused on these archives and particularly the judges' notebooks for evidence of caseflow management. With the exception of Eastham's notebooks, the other referees' notebooks and correspondence were barely legible and could only be read with some difficulty or computer aided enhancement.⁴³

Judicial Statistics are also incomplete and no records are available for this court in the years 1940-46. This is confirmed by the House of Lords librarian.⁴⁴ The format of the *Judicial Statistics* was changed in 1920⁴⁵ and descriptive analysis as to the nature of cases discontinued. Further research was undertaken at the British Library and the Lambeth Palace library, with searches and enquiries being made at the High Court library, the Technology and Construction Court, and The House of Lords library. Informal discussions were held with Mr Justice Dyson (as he then was), Mr Justice Jackson and Judge Anthony Thornton QC, and former Judge Edgar Fay QC. These judges, who formerly practised as counsel in the court, gave me the benefit of anecdotal reminiscences and they confirmed more enlightened approach of some referees.

1.10 Methodology

The initial research for this study was carried out at B.L.P.E.S. consisting of a study of the historical context and background against which the judicature reforms of the nineteenth century took place. This was important to establish the reasons for the creation of the office and the difficulties with the system at that time. This initial research focussed upon the *First Report of the Commissioners* (1869) and the earlier and subsequent legislation regarding referrals. This research formed the basis for Chapter 2: In Chancery. A review was also carried out of all the reported cases featuring

⁴² PRO 69/269.

⁴³ Author's Archive taken with four types of digital camera (ranging from 2-9 mega pixels) at the National Archives under special licence.

⁴⁴ Letter from Mr Vollmer. Bibliography and Appendix p.127.

⁴⁵ Considerable amounts of useful information were omitted e.g. the number of cases defended and undefended.

referees and of journal articles. Apart from the reported cases describing the jurisdiction of the court and Judge Edgar Fay's book *Official Referees' Business*⁴⁶ very few published works exist, although there is an abundance of literature on the subject of construction law.

Apart from the Judicature Commissioners' recommendation for the creation of the office which appertains to macro-caseflow management, there was no evidence of micro-caseflow management. This, if it existed, could only be found in court records or other contemporary documents. There was some hint of this in Fay:⁴⁷

...they not infrequently themselves make suggestions with a view to rendering the trial more manageable or shorter or less expensive.

Save for Newbolt's article in the *Law Quarterly Review*⁴⁸ that refers to what is described here as Newbolt's "Scheme," there was no recognition in the *Rules of the Supreme Court* that the "Scheme" ever existed. Not even Newbolt's books: *Out of Court*⁴⁹ and *Summary Procedure in the High Court*⁵⁰ give any hint of the practices he employed as a referee, although in the latter his mastery of procedural law is evident. If such evidence existed therefore it had to be found in the surviving archival materials. Thus, the most important research for Chapter 3 and subsequent chapters focussed on the contemporaneous materials at the National Archive with some ancillary material at the British Library and Lambeth Palace Library; in particular, the files referred to at 1.9 above with initial emphasis on the Lord Chancellors' files. These revealed Newbolt's correspondence with Birkenhead which led me to the discovery of Newbolt's "Scheme." This provided key information for the qualitative analyses and literature reviews in Chapters 3 and 4 as well as background for Chapter 5. Chapter 5 presents a quantitative analysis of *Judicial Statistics*, the Minute Books and judges' notebooks based on the surviving judges notebooks (1944-70) and Minute Books (1959-67). All the judges' notebooks for 1944-70 were reviewed with 26 being selected, digitally photographed, and examined for evidence of the "Scheme." This selection was made so that each year was covered by at least one notebook, save that all notebooks and Minute Book records were selected for the quantitative analyses of 1959-62 and 1965-67 in Chapter 5. That chapter and Chapter 6 contains analysis of existing *Judicial Statistics* between 1919 and 1970. The selection was made after review of the National Archive

⁴⁶ n.20

⁴⁷ n.20 p. 7 para 1-06.

⁴⁸ n.2 p.427.

⁴⁹ Newbolt, Sir Francis. *Out of Court*. (London Philip Allan & Co. 1925)

⁵⁰ Newbolt, Frank. *Summary Procedure in the High Court* (London: University of London Press. 1914)

Catalogue and a preliminary review of a selection of Notebooks. Once that initial study had been carried out after examination of the relevant Lord Chancellors a review was undertaken of the notebooks from 1944 to 1960.

Each year's statistics were examined and photographed then inserted in the appended spread sheet.⁵¹ Various statistical tests and analyses were conducted and formulae applied to ascertain the average efficiency of the court and to measure backlog. A quantitative examination was then conducted of referees' Minute Books from 1959-62 and 1963-65 to ascertain the actual average time recorded with a view to comparing the non-case managed and case managed time.

Detailed research was carried out on the *Times* digital archives for bibliographical references to the referees and books and articles written by them. A literature review of modern case management was carried out by reviewing the recent civil justice reforms, the CPR, Lord Woolf's Reports and his lectures and the writings of leading academics here and in the United States.

In terms of research methods, Chapter 2 is written in the form of a literature review and qualitative analysis of the Commission, its reports and other contemporaneous materials. Chapters 3 and 4 follow the same methodology save that they focus on *National Archive* materials described above. The literature review in Chapter 4 like that of Chapter 3 refers only to original documents filed at the National Archive, they being: the Lord Chancellors' Office files in L.C.O Series 4; being 4/152, 4/153, 4/154, and 4/417; the J. Series Referees' Notebooks for the period 1946-1960, being J.114/3, J.114/4, J.114/14, J.114/15, J.114/16, J.114/17, J.114/21, J.114/28, J.114/34, and J.114/35; Case files J.115/1, J.115/6, J.115/10, J.115/23, J.115/28, J.115/49, and J.115/56. Minute Books for the period 1959-1967⁵² being J.116/1 to J.116/4 inclusive⁵³ were also reviewed for this purpose. The study was extended however after numerous requests and enquiries concerning missing Minute Books as a result of which J.116/2 and J.116/4 were discovered.

All the material for this study was selected after a thorough review of the above evidence which is catalogued in the Bibliography. All relevant files were digitally photographed.

The surviving early court files were also examined and a selection was made on a

⁵¹ Civil Judicial Statistics Analysis: Official Referees: 1919-70.

⁵² These being notes of the time spent in the court.

⁵³ Lord Denning agreed that only a sample of these files should be retained. PRO. 69/269

random sampling basis.⁵⁴ Two case files outside the research period (1973 and 1974) were examined to see whether there were any significant departures from the the “Scheme.” as described in the second research period.⁵⁵

Chapter 6 presents a further qualitative and quantitative analysis as well as a synthesis of the preceding chapters based on the same sources, with Chapter 7 being a synthesis of earlier findings. Chapter 8 synthesises the study in relation to its contribution to current literature on ADR and Access to Justice.

1.11 Organisation of study

Thus in order to understand these phenomena and the effect and evolution of Newbolt’s “Scheme” this study is organised into eight chapters.

The first explains the research and subject matter.

The second considers the inception of micro-caseflow management.

The third describes the invention of the “Scheme”, the theory and its elements.

The fourth is a continuation of the third with post war models of caseflow management in the court.

The fifth provides a quantitative analysis from the published public data and unpublished archival data.

The sixth is a further analysis of the evolution of caseflow management after the war and the seventh chapter provides a synthesis of earlier findings. The eighth concludes with recommendations and conclusions.

What emerges is an interesting juxtaposition between the official judicial role and the informal process practiced by the referees demonstrating the effects that may be obtained with elements of micro-caseflow management. This is set in context in chapter 8.

⁵⁴ These are: J.115/1: *Cowley Concrete Ltd v Alderton Construction Co.Ltd.* (1962. Unreported); J.115/6: *Alloy and Fibreboard Co Ltd vF Superstein* (1965. Unreported); J.115/10: *Gloucestershire County Council v Henry William Richardson and the Ocean Accident and Guarantee Corporation Ltd* (1966); J.115/23: *A.G. Baxter(Stotfield)Ltd v J.S. Dunne* (1967. Unreported.); J.115/28: *Alexander and Angell Ltd vF.C. Pilbean* (1968.Unreported).

⁵⁵ These were: J.115/49 and J.114/56 relating to the cases of *A.D Bogen and Associates v D.T. Hunneyball and Rossal Estates* (1973. Unreported) and *F. Golf and Sons Ltd v Bentley Golf and Country Club Ltd* (1974. Unreported)

1.12 Contribution to research in civil justice and dispute resolution

The study makes the following contributions to research in this field:

1. The very important discovery as to referee caseflow management in the 1920s and onwards;
2. It demonstrates that the referees were ahead of their times in procedural development;
3. It attempts to measure judicial efficiency in relation to case managed cases and non- case managed cases;
4. It analyses *Judicial Statistics* as not previously analysed in any publication in England regarding this court;
5. It suggests that there is a benefit in having subordinate judicial officers for certain roles;
6. It suggests that part of the judicial function encompasses settlement in certain circumstances;
7. It further suggests that there might be advantage to the extent that the proceedings are in a court of law, and resolution achieved according to rules of court and to law.
8. Newbolt's "Scheme" provided a judicial blueprint for more expedient and cost effective litigation.
9. It hypothesises that this rudimentary process may have been used in up to a quarter of all referrals or used in some facet in 5,404 cases⁵⁶ and was capable of producing an 80 per cent saving in expert witness costs in Newbolt's time⁵⁷.

⁵⁶ See: Table T.5.35 see also para. [7.3.3]

⁵⁷ n.2 p. 427 see also para. [7.5.8]

CHAPTER 2

IN CHANCERY: THE INCEPTION OF MICRO CASEFLOW MANAGEMENT.

This chapter is both a literature review and a qualitative analysis in which we consider:

- > the symptoms of systemic failure in the pre-1873 system which led to the creation of the referee's office;
- > the relevant recommendations of the Judicature Commissioners and the reasoning behind them;
- > their objectives at macro-level and those of Newbolt at micro level;
- > the referees' diverse jurisdiction which provided a creative foundation for the evolution of interlocutory innovation.

2.1 Macro-management problems in the civil justice system

The problem with the legal system in the early to mid-nineteenth century which led to the judicature reforms of the 1870s was endemic. The system was described by the Attorney General⁵⁸ on 9 June 1875 as:

...having grown up during the Middle Ages, was incapable of being adopted to the requirements of modern times

and that.⁵⁹

it was beyond controversy, that in many instances our procedure was impracticable and inconvenient, for no one practically conversant with its details could deny that there were certain great defects in them which ought to be remedied.

The Attorney in the same debate spoke of the great waste of judicial power within the Common Law Courts with four judges on the same bench and the "great defect" represented by the Terms and Vacations of the legal year.⁶⁰ The great defect he further described as the divide and conflict between the competing jurisdictions of equity and Common Law. This resulted in delay, duplication and contradictory decisions at first instance with separate appellate regimes for courts of Chancery and Common Law with single judges adjourning a question of law to a four-man court rendering two trials necessary.⁶¹

2.2. Judicial overload and backlog

An analysis of *Returns of Judicial Statistics* in this period suggests systemic failure in the Superior Courts.⁶² By way of example: the Court of Chancery. Here the problem

⁵⁸ Sir Richard Baggallay (20 April 1874- 25 November 1875), H.C. Deb. Vol. CCVI col.641.

⁵⁹ H.C. Deb. Vol. CCVI col.641.

⁶⁰ H.C. Deb. Vol. CCVI col.642.

⁶¹ H.C. Deb. Vol. CCVI col.669. Mr Gregory. M.P.

⁶² The Courts of Chancery, Common Pleas, and Exchequer Chamber.

was acute. Proceedings in Chambers in the Chancery Court increased from a Cause List total of 28,083 in 1861 to 42,726 in 1870-71; an increase of 152 per cent, or an average yearly increase of 1,464 cases. Proceedings in Chancery as a whole increased from 69,008 in 1861 to 84,730 in 1870, an increase of 122 per cent; or an additional 15,722 matters in Chancery as a whole.⁶³ Things were so bad that one solicitor had written to *The Times* to say there were 507 cases in Chancery and it would take three years to complete them.⁶⁴ Clearly backlog and judicial overload were a problem and thus there was some justification for the promotion of a radical review of the civil justice system at that time.

As a Leader in *The Times* stated:⁶⁵

The Exchequer Chamber sat 5 days in all; out of eight cases from the Queen's Bench Division, after two days sitting six were left in arrear; out of nine cases in the Common Pleas, six were left in arrear, after two days sitting. The last time the court sat was at the end of June, and it cannot sit again before next February at the earliest.

Further evidence of the problem is provided from the debate on the Judicature Bill in June 1873. The Bill was based upon the recommendations of the Judicature Commissioners⁶⁶ and their report published in 1869. Its remit focussed on investigating the operation and effect of three aspects: first, the constitution of the courts in England and Wales; second, the separation and division of jurisdictions between the various courts at macro-level, and third, the distribution and transaction of judicial business of the courts, and courts in chambers at micro level. Additionally the Commission considered whether there were sufficient judges and the position of juries.

In debating the Bill, the Attorney General, Sir Richard Baggallay, thought that the problem might be overcome if the judges extended their sittings by six weeks per year.⁶⁷ He reported that the position may have been even worse on any given day in 1870, 1871, 1872, and 1873 as there were respectively 302, 461, 431, and 536 cases pending in

⁶³ H.C. Deb. Vol CCVI (3rd Series) 9 June 1873. Col 667, Attorney General's speech quoting from *Judicial Statistics* 1860-61 and 1870-1871.

⁶⁴ H.C. Deb. Vol CCVI (3rd Series) 30 June 1873. Col 1587. The Chancery Court dealt however with 1000 cases per year according to the Solicitor General.

⁶⁵ *The Times* 4 December 1872 p.9. Issue 27551, col c.

⁶⁶ In September 1867 Queen Victoria appointed the Judicature Commissioners. They included; Lord Justice Cairns⁶⁶ of the Court of Appeal in Chancery, Sir James Wilde a judge of the Court of Probate Divorce and Matrimonial Causes, Sir William Page Wood, a Vice-Chancellor, Sir Colin Blackburn, a judge of the Court of Queen's Bench, Sir Montague Smith, a judge of the Court of Common Pleas, Sir John Karlake, Attorney General, William Jones Vice Chancellor of the County Palatine of Lancaster, Henry Rothey, Registrar of the High Court of Admiralty, Sir William Phillimore, a judge of the High Court of Admiralty Sir Robert Collier and Sir John Duke Coleridge as Solicitor General appointed as Commissioners on the 25 January 1869.

⁶⁷ At that time the court sat for 27 weeks of the year. H.C. Deb Vol CCVI. Col 1588. 30 June 1873

that court. Mr. Morgan, a chancery barrister, speaking in the same debate, said that “there never was such a block in Chancery as at present. . . . The judges were worn out with Court work before they went into Chambers.”⁶⁸ He said that there had been a 123 per cent increase in cases from 1,844 cases in 1863 to 2,275 cases in 1871. He also reported that some of the judges had “completely broken down” under the strain. Clearly relief for the judiciary was urgently required.

The problem as a whole was alarming. *The Return of Judicial Statistics* for 1866⁶⁹ discloses that there was a great increase in the business of the Courts. As compared with 1859 (the year in which the number was lowest since the *Statistics* commenced) the increase in 1866 amounts to 46,890, or 54 per cent. As compared with the average of the eight years 1858-65, the increase in 1866 was 28,475, or 27 per cent. This influx of work overloaded an outmoded system and its effect is demonstrated at Table 2.1 below.

Table T.2.1 Rate of increase of actions

Year	Writs issued	Percentage Increase on earlier year
1859	86,270 ⁷⁰	
1863	100,042	16%
1864	113,158	13%
1865	119,097	5%
1866	133,160	12%

Sources: *Returns of Civil Judicial Statistics* 1859, and 1863-66

Whilst 1866 may be regarded as the high water mark of civil litigation, *The Return of Judicial Statistics* for 1869⁷¹ states that there was a “great decrease” in the number of writs issued in 1868 as compared to 1866.

Table T.2.2 Rate of increase of actions

Year	Writs issued	Percentage Increase on earlier year
1868	82,876	
1869	83,974	1%

Sources: *Returns of Civil Judicial Statistics* 1868 and 1869.

The percentage decrease as between 1866 and 1868 was 38 per cent.

In 1875 after enactment of the Judicature Act 1873 the number of writs issued declined to 68,950.⁷²

⁶⁸ H.C. Deb Vol. CCVI Col 1590.

⁶⁹ 1867 [3919] *Return of Judicial Statistics 1866*

⁷⁰ 1867 [3919] *Return of Judicial Statistics 1866* Image 141 of 206 of which only 27.5% were contested; only 23,762 appearances were entered.

⁷¹ 1869 [C.195] *Return of Judicial Statistics 1866* Image 146 of 221

⁷² 1876 [C.1595] *Return of Judicial Statistics of England and Wales 1875*. Image 171 of 272.

2.3. First Report of the Commissioners 1869

This Commission was chaired by two successive Lord Chancellors and former Attorneys General, Lord Selbourne (formerly, Sir Roundell Palmer) and Lord Cairns (formerly, Sir Hugh Cairns). Their report was first published in 1869.⁷³ No evidence was published with the report but we may conjecture that the Commissioners debated it in their meetings. Sir John Hollams wrote up the minutes of the meetings and then prepared a draft report.

This was followed by two Judicature Bills introduced by Lord Hatherly in 1870.⁷⁴ These Bills failed to command support in the House of Commons and were sent down by the Lords to the Commons after heavy criticism from the judiciary and members of Parliament. The scheme for the administration and organisation of the courts incorporated in the original Bill was revised by Chief Justice Cockburn and his senior colleagues. This revision formed the basis of the reintroduced Bill in 1873.⁷⁵

2.4. The Official Referee: Reasons for creation

2.4.1. Chancery and Common Law practice

The Judicature Commissioners were aware of the practice in Chancery of a referral process. In their report the Commissioners stated:⁷⁶

....questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the Chief Clerk, but any party is entitled, if he think fit, to require that any questions arising in the course of the proceedings shall be submitted to the judge himself for decision. In such a case the decision of the judge is given after he has been sitting in court all day hearing causes.

This was not ideal and it was suggested to the Commissioners⁷⁷ that the judges found this difficult because Chancery judges were too busy with other work.⁷⁸

According to Burrows⁷⁹ the reason why the Judicature Commission recommended the appointment of referees was the practice of the old Common Law and Chancery Courts. These two macro-caseflow management processes were already developed. First, a process whereby the master⁸⁰ or chief clerk would report to the judge or otherwise direct

⁷³ n.5

⁷⁴ Hansard. Lords. 13 February 1873 col.334.

⁷⁵ Hansard. Lords. 13 February 1873 col.335-6.

⁷⁶ n.4.p.13.

⁷⁷ But there is no evidence cited at p.13 of the *First Report* as to who made that submission, but presumably members of the Bar.

⁷⁸ n.5 p.13

⁷⁹ n 15

⁸⁰ The Common Law Courts also had power to delegate to a Master.

an issue to be tried by a Common Law judge sitting with a jury. In the former case the report would be embodied in the judge's judgment. Second, Chancery matters could be referred to an expert not a lawyer.⁸¹ This might well be the genesis of modern "expert determination", although in the Chancery practice the expert's view was not final and binding but incorporated into the judgment.

Furthermore, under Section 3 of the Common Law Procedure Act 1854, a judge could direct a reference of an account before trial or the taking of an account at trial under Section 6 of that statute. He could direct that any preliminary question of law should be decided by way of special case or otherwise. Under this power the judge could decide the matter himself summarily, or order that it be referred to an arbitrator appointed by the parties, or to an officer of the court, or in country cases, to a county court judge. In such matters the award or decision was enforceable as if it were the verdict of a jury.⁸² Here we have the genesis of the referee.⁸³ As Judge Fay wrote, the officers of the court in those times were masters.⁸⁴ The innovation was the reference to an arbitrator in the course of the proceedings (a compulsory reference in accounts cases). Fay says that it was Holdsworth who concluded that in respect of Section 3 Common Law Procedure Act 1854:

It was this extended use of arbitration by the courts which induced the Judicature Commissioners to recommend and the Judicature Acts to create the office of official referees.⁸⁵

Holdsworth may be right, but Sir Roland Burrows QC who was Lord Birkenhead's former private Secretary wrote:⁸⁶

The reason for the recommendation is to be found in the practice of the Courts of Common Law and of Chancery.

Whether the inducement was the practice of arbitration or litigation a new model was created: a court officer and a subordinate judge with a referral jurisdiction to deal with matters of enquiry and report, reference for a preliminary issue, and the taking of an account.

⁸¹ *Gyles v Wicox* (1740) 2 Atk. 141).

⁸² n.15 pp. 504-513.

⁸³ According to Burrows (n.13 p. 510) Section 3 of the Common Law Procedure Act 1854 took into account the practice of the Court of Chancery of ordering reference to officers of the court or specially qualified persons to inquire and report, and the other the practice of making consent orders for arbitration.

⁸⁴ n.20.

⁸⁵ Holdsworth, *History of English Law*, Vol.XIV, p.198

⁸⁶ n.15 p.504

The Commissioners also considered Section 3 Chancery (Amendment) Act 1858 which provided that the Court of Chancery could make provision for the assessment of damages or any question of fact arising in any action or proceeding to be tried by a special or common jury. Juries were not always appropriate in understanding complex scientific and technical issues and this in the common law context influenced the Commissioners towards the use of the referee in such matters.⁸⁷

Interestingly, ten years before the Judicature Commission's First Report Dr Clifford Lloyd, an Irish Jurist, gave evidence to a similar commission.⁸⁸ In his evidence on the working of the Irish Chancery Act he referred to the position of a referee and converting: "the office of Master from that of a referee to a judge with original jurisdiction." He concluded that the subordinate office of a referee was more akin to that of a master. Section 172 of the Superior Courts of Common Law (Ireland) Act 1864 provided for matters of account to be referred by the judge to an arbitrator, or officer of the court, or to a referee who was empowered to make an award or issue a certificate effective as the verdict of a jury.

2.4.2 Experts

In their *First Report*⁸⁹ the Judicature Commissioners considered that there was a class of case unfit for jury trial and in many cases the disputants were compelled to arbitrate.⁹⁰ This was an important part of their consideration, as was the recommendation of the Patent Law Commissioners⁹¹ regarding the judge trying such cases with assessors whom he selected, or alone without a jury unless the parties required. They considered it might be desirable to have the aid of scientific assessors during the whole or part of the proceedings.⁹²

The Commissioners also considered referrals under the Common Law Procedure Act 1854 where disputes had been referred to a barrister or an expert. Barristers could not be expected to give such matters the continuous attention they deserved. Experts were not

⁸⁷ n.20. p.10

⁸⁸ The evidence of Dr B Clifford Lloyd QC, Dublin 12 November 1862 to the Royal Commission to enquire into Superior Courts of Common Law and Courts of Equity of England and Ireland. *First Report. Parliamentary Papers* [1863] [3228]

⁸⁹ n.5

⁹⁰ n.5. p.12. The parties could not however be compelled to do so until the enactment of the Common Law Procedure Act 1854 where the dispute related wholly or partly to matters of account under Section 3 of the Act or where the parties had entered into a covenant to refer the dispute to an arbitrator

⁹¹ Report 29 July 1864. Patent Law Commissioners.

⁹² n.5. p. 14 para 4.

recommended because they were unfamiliar with the law of evidence and rules of procedure and the risk that they would allow irrelevant questions.

2.4.3 Juries

The Judicature Commission were critical of the role of the jury in some cases. They reported:

The Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of cases frequently occur in practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial.⁹³

The Commissioners further concluded:

...there are several classes of cases litigated in the courts to which trial by jury is not adapted, and in which the parties are compelled-in many cases after they have incurred all the expenses of a trial-to resort to private arbitration.⁹⁴

The practical problem with the Common Law Procedure Act 1854 was that the referee had no authority over practitioners and witnesses and this led to constant adjournments.

2.4.4 Arbitrators

Arbitration may have had an influence on the Commissioners as Holdsworth suspected because the Commissioners recommended that a party to an action could apply to a High Court judge for the appointment of a referee, or the judge himself appoint one.⁹⁵ Under the Common Law Procedure Act 1854 the parties could be compelled to arbitrate the dispute where the matter related wholly or partly to accounts or where they had agreed in writing.⁹⁶ But the Commissioners were also alive to the difficulties caused by arbitration which they expressed as:

The Arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgement, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the Arbitrator, unless he fails to decide on all matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case.⁹⁷

There was also public disquiet about that alternative process as *The Times* leader commented:⁹⁸

The especial scandal of the Common Law - we mean the system of compulsory arbitration, so often imposed at the eleventh hour upon the unwilling suitor because the judge will not,

⁹³ n.5. p.5.

⁹⁴ n.5. p.12.

⁹⁵ n.5. p.14

⁹⁶ n.5. p.12.

⁹⁷ n.5. p.13.

⁹⁸ *The Times* 22 April 1869;p 8; Issue 26418; col F.

or cannot, entertain his case - is to be removed, and official and other referees will act under the court.

It was said that arbitrators regulated their own fees and that:

The result is great and unnecessary delay, and vast increase of expense to suitors.....Fees were large, adjournments frequent and erroneous results could not be rectified on appeal.⁹⁹

The problem was exacerbated because counsel and witnesses were frequently involved in other matters necessitating adjournments.¹⁰⁰

The Commissioners therefore sought to avoid references whether to an arbitrator, expert or barrister¹⁰¹ and compel parties to litigate before a referee.¹⁰² They considered they had good reason to replace juries and arbitrators at that time because a common jury could not handle complex matters of fact, arbitration was costly and there was much delay.

The Commissioners concluded that this caused:

great and unnecessary delay, and a vast increase of expense to suitors.

The referral to a referee would be compulsory and the referee would sit from day to day.¹⁰³ In this way delays and appeals would be avoided and the referee would replace a special jury, an arbitrator, an assessor and an expert.

In that respect referees were an essential tool of more efficient macro-caseflow management.

2.5. The Judicature reforms

The Commission had a dual purpose: to reconcile the rival systems of Common Law and Equity and to resolve technically complex cases where a jury of laymen had difficulty. Thus, the terms of reference of the Commission included an enquiry into the civil courts apart from the House of Lords, but including:

.....the operation and effect of distributing and transacting the judicial business of the courts, as well as courts in chambers;¹⁰⁴

⁹⁹ n.19 p. 12

¹⁰⁰ n.5 p. 13. Sometimes counsel appearing before the referees considered themselves equally senior.

¹⁰¹ n.5 pp.12-13.

¹⁰² n.20 As Fay says p.13: "The good was to be taken, the bad rejected." In certain cases it became compulsory for enquiry and report (s.56) or for complex factual scientific or technical questions or any account. (s.57)

¹⁰³ n.5 p.14.

¹⁰⁴ n.5. p.4.

(a) Administrative reform

The background against which the office of referee was invented was momentous. The judicature reforms transformed the litigation landscape with equitable and legal remedies available in one Supreme Court of Judicature. Trial by jury had been the cornerstone of the civil justice system predicated on the supposition that every issue of fact was capable of trial in that way¹⁰⁵ but a large number of cases could not be adapted to that mode.¹⁰⁶ But many suitors favoured arbitration because of “the defects of the inadequate procedure.”¹⁰⁷ There had to be a transfer and blending of jurisdiction of equity and law, a conclusion independently reached by two other judicial commissions enquiring into the Common Law Courts (1850) and into Chancery (1851). There was also the litispence problem of concurrent actions in the Common Law and Chancery courts producing different outcomes at first instance and in their separate appeal courts. Thus, the Judicature Commissioners¹⁰⁸ considered that:

It seems to us that it is the duty of the country to provide a system of tribunals adapted to the trial of all classes of cases and be *capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried.*¹⁰⁹

They had in mind a more flexible system adapted to the needs of all types of cases. In the context of the referee it might be interpreted as justifying the “Scheme.” The “manner most suitable” inferred some flexibility in the process applied.

(b) Procedural reform

Another objective of the Judicature Commission was to make recommendations for the:

more speedy economical and satisfactory despatch of the judicial business transacted by the courts.¹¹⁰

In order to affect this, the Judicature Commission recommended:¹¹¹

That as much uniformity should be introduced into the procedure of all Divisions of the Supreme Court as is consistent with the principle of making the procedure in each Division appropriate to the nature of the case, or classes of cases, which will be assigned to each; such uniformity would in our opinion be attended with the greatest advantages, and after a careful consideration of the subject we see no insuperable difficulty in the way of its accomplishment.

¹⁰⁵ n.5. p.5

¹⁰⁶ n.5. p.5

¹⁰⁷ n.5. p.6

¹⁰⁸ n.5. p. 13

¹⁰⁹ Author’s italics.

¹¹⁰ n.5 p.4

¹¹¹ n.5. pp 10,11.

The Commissioners decided to recommend that great discretion should be given to the Supreme Court as to the mode of trial and that any questions should be capable of being tried in any Division.¹¹² They concluded that there should be three modes of trial: before a judge, jury or a referee.¹¹³

It is interesting to note that the Commissioners also recommended the use of short statements,¹¹⁴ as distinct from pleadings, to be called a “Declaration” constituting the plaintiff’s cause of complaint and a similar statement from the defendant constituting an “Answer.” They warned, as Newbolt was to warn half a century later, about pleadings that were open to “serious objection.”¹¹⁵ They went on to say:

Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts that lie behind them are seldom clearly discernable.

They suggested the best system to be:¹¹⁶

...one, which combined the comparative brevity of the simpler forms of Common Law pleading with the principle of stating intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff’s or the defendant’s case as distinguished from his evidence.

Regrettably, pleadings were not simplified because of the complexity of certain cases, but certainly Newbolt (as will be noted in Chapter 3) dispensed with them altogether in at least one action.¹¹⁷ Despite the Commissioners’ purpose a “Judicature Commissioner” writing to *The Times* anonymously in August 1880 wrote:¹¹⁸

But I unhesitatingly assert that the present system of pleadings is often productive of enormous delay and expense, with little, if any corresponding advantage. I have now lying before me the pleadings in an action recently commenced which, although yet incomplete, have already reached the length of upwards of 2,500 folios. I have another case before me in which a statement of claim 260 folios in length has just been delivered. I could refer to other similar cases in my own experience, but I will content myself by mentioning one in which, although an action to recover the amount of two promissory notes, the pleadings extended to upwards of 200 folios in length.

It may be said these instances are exceptional and that they are taken from the Chancery Division; but few, I think will deny that prolixity is on the increase in the Common Law Division also.

I think I may with confidence, assert that the Judicature Commissioners did not anticipate that these results would follow from their recommendation that the plaintiff and defendant should respectively deliver a statement of complaint and defence, which statements were to be “as brief as the nature of the case will admit.”

¹¹² n.5 p. 13

¹¹³ n.5. p.13

¹¹⁴ n.5. p. 11. A Reply would be allowed but not any further submissions with “special permission” of the judge.

¹¹⁵ n.5. p.11.

¹¹⁶ n.5. p.11.

¹¹⁷ Chapter 3 para. 3.11 and n.5 p. 430.

¹¹⁸ *The Times* 16 August 1880 p. 11 Issue 29961; col G. Reputedly, Lord Bowen.

2.6 Pioneers of caseload management: Selbourne and Cairns

The principal pioneers of the referees' office were Lords Selbourne and Cairns as they were responsible for drafting the enabling legislation, as well as piloting that legislation through Parliament, and making the administrative arrangements. Both Lord Chancellors were Classics' scholars: one from Oxford, the other from Dublin.¹¹⁹ Both had served as Attorneys General. Lord Selbourne was a distinguished member of the Church of England, and Lord Cairns was described by Lord Chief Justice Coleridge as "a person of severe integrity."¹²⁰

2.6.1 Lord Selbourne, Lord Chancellor of England¹²¹

In 1872 Roundell Palmer became Lord Chancellor in succession to Lord Hatherly. He pioneered the Supreme Court of Judicature Bill that took effect in 1873. In his *Memorials Personal and Political 1865-1895*¹²² he wrote:

It was a work of my own hand, without any assistance beyond what I derived from the labours of my predecessors; and it passed substantially in the form in which I proposed it.

He acknowledged support from Lords Cairns, Hatherly, Westbury, Romilly, Lords Justices Cockburn, James, Mellish and Bovill, Chief Baron Kelly, the Solicitor General and the Attorney General.¹²³

As to the *First Report* he says:

Much as I profited by the experience and work of others, I might without presumption take to myself some credit for the initiative, advancement and completion of this work¹²⁴.....If I leave any monument behind me which will bear the test of time it may be this.

2.6.2. Selbourne's macro and micro objectives

Selbourne introduced the referee into the wider public domain in his historic speech in the House of Lords on the second reading of a third Judicature Bill on the 13 February 1873.¹²⁵ His predecessor Lord Hatherly had had difficulty in introducing two previous Bills: the High Court of Justice Bill and the Appellate Jurisdiction Bill. Both Bills were read a second time in 1870, but were lost in committee and withdrawn.¹²⁶ Selbourne

¹¹⁹ Lord Selbourne, Magdalen College; Lord Cairns, Trinity College.

¹²⁰ *Oxford Dictionary of National Biography, Cairn, Hugh McCalmont, first Earl Cairns (1819-85)* by David Steele. pp. 1-10 <http://www.oxforddnb.com/view/printable/4346>

¹²¹ 1872-74 and again in 1880-85.

¹²² Lord Selbourne *Memorials Personal and Political 1865-1895* (London: Macmillan & Co, 1898)

¹²³ n.122 Vol. 1 p.301

¹²⁴ n.122 p.300.

¹²⁵ Hansard (3rd Series). 13 February 1873. Col 331

¹²⁶ *The Times* 14 February 1873. p.7; Issue 27613;col B.

confirmed that this movement for reform came from Parliament and the judiciary itself.¹²⁷ The superior judiciary¹²⁸ appear to have been the most vociferous critics of the outdated legal system. He said that the reforms sprang from the advancement of society, the increase in legal business, and separation of the superior courts. The aims of the Bill were directed to more efficient macro-management in the unification of legal and equitable jurisdictions; a single undivided jurisdiction; provision as far as possible for cheapness, simplicity and uniformity of procedure; and an improvement in the constitution of the Court of Appeal.¹²⁹

Under the new arrangements cases could be transferred for the efficiency of business.¹³⁰ The emphasis here was clearly on efficiency, cheapness, simplicity, and uniformity. It was also on practicality.

Regarding the new officer of the court, the referee, he said:

It is proposed to retain trial by jury in all cases where it now exists, except in one particular.

Your Lordships know that there is a class of cases which the parties may take to the Assizes, and in some instances must take there, and which are yet totally unfit to be tried by a jury at all. The result is that the parties are compelled to take such cases out of court and submit them to arbitration; and as no provision has been made by law for the conduct of these arbitrations, the consequence is that very great expense frequently arises out of them. It was a very valuable recommendation of the Judicature Commission that public officers to be entitled "Official Referees" should be attached to the court, to deal with cases of this kind, and to whom such cases should be sent at once without the useless expensive form of a jury trial.

The Bill proposes that such cases should be sent to reference, even if the parties do not consent, and it also provides for the appointment, where the parties may desire it of special referees. The proposal in the Bill is that they shall determine all questions of fact or account, leaving questions of law to be determined by Divisional Courts. I venture to think that will be found a valuable and important provision.¹³¹

Selbourne thus recommended the creation of the referee.

Whilst this was a subordinate jurisdiction it had the germ of a flexible process which provided an opportunity for caseflow management.

Selbourne and his successors' roles were critical here in relation to the new referees. Under Section 83 of the Judicature Act 1873, he was responsible for referee appointments, qualifications and tenure in office with the concurrence of the Heads of

¹²⁷ The Report was presented to Parliament in 1869.

¹²⁸ Description of senior judges in the pre-1873 system.

¹²⁹ The Court being constituted by the enactment there was concern about manpower.

¹³⁰ Although judges would be enabled to transfer cases to official referees one referee could not transfer a case to another. In 1888 the Rules were changed to enable the Lord Chancellor and the Lord Chief Justice to transfer cases from one referee to another having regard to the state of business. (RSC December 1888.)

¹³¹ Hansard. Commons. 13 February 1873 col. 346. The Hansard reports here are in indirect speech.

Divisions subject to Treasury sanction. The Treasury limited the number of referees to four. This created a tension with the judiciary at times when the lists were overloaded. This overload created a backlog further justifying Newbolt's "Scheme."

Lord Selbourne's objectives were echoed in the House of Commons by the Solicitor General speaking on the 10 July 1873:¹³²

Referees were to be appointed without the consent of the parties for conducting any enquiry which could not, in the opinion of the court, be conducted in the ordinary way. The Bill proposed as regarded documents, to continue the present practice of the Court of Chancery, and it was quite impossible that questions of detail should be examined in court except on appeal. Accounts in Chancery were never taken in court, but were referred to chambers in some way or other, and were taken by an officer termed a Chief Clerk. At Common Law such matters were referred to a master or to an arbitrator. They could not be taken in court at all.

The Solicitor General went on to say:

The intention of the clause (Clause 54-Power to direct trials before referees) was to prevent useless expenditure of that description, and that references should be made without the consent of the parties. Clients were often disgusted at finding that heavy expenditure incurred in the preliminary stages of a trial were thrown away, on their case going to arbitration.

The Lord Chancellor's and the Solicitor General's speeches confirm the objective of avoiding unnecessary cost through referrals to arbitrators, and also to relieve High Court judges of detailed factual examinations. They also confirm the reason for the creation of the office of the referee answering the first research question. They incidentally disclose an understanding of the difficulties of judicial macro-management. In many respects there is empathy between Selbourne, Baggallay and Newbolt in relation to delay and cost. All these concepts are relevant to what Newbolt and some referees attempted in later years and the roots of what Newbolt developed have their origin in concept here.

2.6.3. A judge without jurisdiction

However, it is important to appreciate that the referees had no inherent jurisdiction as Burrows stated:¹³³

...an Official Referee as such has no jurisdiction. He can only try such actions as by law can be and by order are referred to him and his decisions are not of authority for other cases.

In other words, the referee had no jurisdiction other than what was referred. The Commissioners designed a flexible role for referees whereby they could refer the matter back to the judge or resolve the issue themselves.

¹³² Hansard. Commons. 10 July 1873. col.174.

¹³³ n.15. p. 506.

The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the referee should have the same effects as a verdict at *nisi prius*, subject to the power of the Court to require any explanation or reasons from the referee, and to remit the cause or any part thereof for reconsideration to the same, or any other Referee. The referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding him.¹³⁴

The fact that the judge could direct where the trial took place was a departure from the centralist policy of the courts being in one building in London. The referee was to investigate the case and report his findings to the High Court judge. He was also given power to hear the case *de die in diem* (from day to day) and to adjourn if necessary.

His primary task was to relieve the High Court judge of complex factual analysis and compile a report. Thus, where the parties consented a matter could be referred. Where the parties did not consent to a referral, the judge could only refer the case to a referee if it involved a prolonged examination of documents, or accounts, or an investigation of scientific or local matters on a question or issue of fact or account.¹³⁵ Section 83 of the Judicature Act 1873 provided that the numbers and qualifications of the referees were to be determined by the Lord Chancellor and with the concurrence of the Heads of Divisions and the sanction of the Treasury.¹³⁶

2.6.4 Rules of the Supreme Court

A greater appreciation of what Lord Selbourne was attempting is evident from his personal directions and orders to three lawyers who were employed with the task of drafting the first *Rules of the Supreme Court*.¹³⁷ In his general directions dated 25 November 1873, Selbourne set out the guidelines for the draftsmen:

Substance of the Work

.....the object is now to frame one general system of procedure which shall be as far as possible uniform in every Division of the High Court and equally applicable to all kinds of actions and suits. In constructing this system, the utmost attainable degree of conciseness and simplicity is to be aimed at; all superfluous steps (such as applications for orders or praecipes of Court, when mere notice between parties might be sufficient) should be dispensed with; and all occasion for any unnecessary expense and delay, should, as far as practicable be cut off.

There is empathy here with Newbolt's "Scheme" in eradicating unnecessary expense and delay. The draftsmen were also to adapt:

¹³⁴ n.5. p.14

¹³⁵ Judicature Act 1873, s 57

¹³⁶ Referees were appointed under s.84 of that Act and the Treasury determined their salary under s.85.

¹³⁷ 89.M.S. 1866 ff.75-78 *Papers of Lord Selbourne*. Lambeth Palace Library Letter from Roundell Palmer to Henry Cadman Jones, Tristram (Thomas Hutchinson) and Arthur Wilson.

.....to general use, in the High Court whatever is best, and most approved by experience, in the existing practice of the present Courts, with proper simplifications and improvements.

Selbourne's objective was clear: simple concise rules for all actions without any unnecessary or uneconomic steps. The lawyers were referred to Chancery practice and the Common Law Procedure Acts¹³⁸ and other states' procedures e.g. the New York Code of Civil Procedure and the Indian Procedure Act 1859.¹³⁹

At macro-level the essence of the proposals was designed to bring about a fundamental reorganisation of the courts and make them more efficient. A key part of the reform was the referral system relieving High Court judges of complex technical cases and avoiding lengthy jury trials. In that respect the referee's role was critical in alleviating cost and delay in complex factual cases. This was given expression in the rules regarding referees. The *Rules of the Supreme Court 1873-75*¹⁴⁰ provided for trials by the referee at first instance in accordance with Sections 56 and 57 of the Judicature Act 1873.¹⁴¹ RSC 1875 Order 36. r.30 provided that the referee could hold the trial at, or adjourn it to, any convenient location, carry out inspections and view the site. RSC Order 36. rr. 31 and 32 gave the referee power to conduct the trial as a High Court judge.

¹³⁸ Chancery Practice Amendments Acts 1850, 52, 58, and 60. Common Law Procedure Acts were passed in 1852, 54, and 60.

¹³⁹ 89.M.S. 1866 ff.77v78 *Papers of Lord Selbourne*. Lambeth Palace Library

¹⁴⁰ The Rules 34 and 35 of the Rules of Procedure were appended in a Schedule to the Judicature Act 1875 provided for proceedings before an Official Referee and described the effect of the referee's decision. See: Preston, Thomas *The Supreme Court of Judicature Act 1873*. London. William Amer.

¹³² Section 56: Subject to any rules of court and to such right as may now exist to have any particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal may be referred by the court or by any Divisional Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee and the report of such referee may be adopted wholly or partially by the court and may (if so adopted) be enforced as a judgment of the court .

Section 57: In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers, the court or judge may at any time on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties.

2.6.5. Lord Cairns 1874-80

Whilst Selbourne may have been the architect of the legislation it was Cairns who sustained the office of the referee. Arguably without Lord Cairns' support the Judicature Bill would never have been passed by the House of Lords nor might the Treasury have been willing to support the appointment of four referees. Cairns had a particular concern as he chaired the Commission which authored the *First Report* and the creation of the referee's office.

Lord Cairns was the first Lord Chancellor to operate under the new court system. Whilst Selbourne and Hatherly were also instrumental in creating the concept of the referee, Cairns ensured its survival. He succeeded in macro-managing the unification of the courts of Equity and Common Law and codifying procedural law. In the particular context of this study the referees owed their existence possibly more to him than any other Lord Chancellor. He shared the "very strong" opinion of the Presidents of Divisions that referees should be substituted for arbitrators.¹⁴² His unequivocal support for the office is evident in the earliest correspondence commencing with his secretary's letter to the Lords Commissioners of H.M. Treasury:

Nov 12th 1875

Sir,

I am directed by the Lord Chancellor to enclose for the information of the Lords of the Treasury the opinion and determination of the Lord Chancellor and of the Heads of the Divisions of the High Court of Justice as to the numbers, qualifications, and tenure of office of the Official Referees in pursuance of Section 83 of the Judicature Act 1873 and I have to ask the sanction of the Treasury.... that these Official Referees should be substituted for arbitrators *pro hac vice*, that the number of Official Referees will not be sufficient and that a greater number will be required: but they (Presidents of Divisions) think that within first instance the experiment may be tried with four Referees, that is to say one for each of the four Divisions, Chancery, Queen's Bench, Common Pleas and Exchequer.

The salary of these Official Referees has to be fixed under Section 85 by the Treasury with the concurrence of the Lord Chancellor.

The Lord Chancellor is of the opinion that looking to the judicial character of the functions which these Referees will have to perform, to the circumstances that they will have to give up all private practice and that their work will be *ejusdem generis* with but certainly higher than that which the Masters who receive £1,500 a year now perform. The salary specified ought not to be less than £1,500 and competent men cannot be got for less, and this opinion is held very strongly by the Presidents of the Divisions¹⁴³.

¹⁴² Letter. H.J.L. Graham. Principal Secretary to L.C. to William Laws, H.M. Treasury. 12th November 1875. LCO 1/73. [HPIM0445-0448.]

¹⁴³ The salaries of judges in 1873 were: Lord Chancellor: £10,000, Lord Chief Justice:£8,000, Vice President of Division:£5,000 and a special allowance of 10 guineas per day for judges on circuit. M.S. 1865.*Papers of Lord Selbourne* .Lambeth Palace Library . Letter 27 January 1873 Lord Cairns to Lord Selbourne.

The Lord Chancellor understands that upon references to Masters of the Common Law Courts of matters of account it has been the practice to charge a fee for each hour of the Master's time occupied, which fee went into the general revenue.

The Lord Chancellor thinks it would be open to the Treasury to consider whether some charge should be made to the suitors to the reference for the time of these Official Referees that may be occupied and that this whole charge of the Official Referees may be lightened.

The Lord Chancellor would be obliged to Their Lordships if they would give the subject of this letter their immediate attention as it is highly desirable that the Official Referees be appointed as soon as possible there being already cases which have been referred to them and are now waiting for trial before them.

Yours

G

This letter underlines the uncertainty as to manpower resource. Lord Selbourne had thought three referees sufficient; Cairns four.

The Treasury reply¹⁴⁴ acknowledged the referees "higher" status.

Treasury Chambers
19 November 1875

My Lord,

In reply to Mr Graham's letter.... I am directed by the Lords Commissioners of Her Majesty's Treasury to state that My Lords observe that it is proposed to appoint a referee for each of the four Divisions of Chancery, Queen's Bench, Common Pleas and Exchequer, but they also do not understand whether it is intended that the Referee shall be exclusively attached to the service of the Division to which he is appointed, or shall be available for duties in another Division if necessity should arise.

With reference however to the present proposal and to the opinion which it is stated that the Presidents of the Divisions entertain that the number of four Referees will not be sufficient but that more will hereafter be required, my Lords would desire to submit to your Lordship some observations which it appears to them should be fully considered before their sanction to the present proposal is given.

When the Judicature Act was before the House of Commons My Lords caused enquiries to be made of your Lordships predecessor as to the probable number of Official Referees whom it would be necessary to appoint, and were informed by Lord Selbourne that in the first instance he considered that three would be sufficient, only one for each of the second third and fourth Divisions of the High Court from which this class of references would come, the first or Chancery Division being already sufficiently provided for by the Chief Clerks in Chancery.

As it is now proposed to appoint a Referee for the Chancery Division also, My Lords would be pleased to be informed whether the point has been considered as to the aid which the Chief Clerks might give in disposing of References from the Chancery Division or to what extent if a Referee is appointed for this Division in addition to the Chief Clerks, the labours of these latter officers might be lightened as to render some reduction of their number practicable.

As regards also the appointment of Referees for the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court and as regards the suggestion that a greater number than four of these may hereafter be required My Lords perceive with reference to the class of cases which will be heard by the Referees (See Section 57 of the Judicature Act 1873) that it is stated by your

¹⁴⁴ Letter Laws to Graham. 19 November 1875 LCO 1/73 [HPIM0449]

Lordship that their duties are ejusdem generis, although certainly higher than those which have hitherto devolved upon the Masters under the Common Law Procedure Acts the class of cases referred to the Masters is understood to have been so important in character, and the number of them to have been on the increase: but if the appointment of Official Referees would have a tendency to lessen the references hitherto made to the Master, the consideration will arise now for it will be necessary to retain the foremost number of the latter officer.

The Legal Department's Commissioners have stated their opinion as your Lordship is no doubt aware that a reduction might be made of four out of the whole number of Masters, as vacancies arise, if this opinion appears to have been formed on grounds apart from any questions of the appointment of Official Referees.

Your etc

Laws.

This Treasury reply indicates that the office involved a compromise between masters and referees, with acknowledgment of the referee's higher status, but with provision for the referees to have chambers and clerks themselves.¹⁴⁵ Lord Cairns' reply on the 24 November 1875 stated that he did not think there would be so many references from the Chancery Division as from other Divisions so that the fourth referee might not be so fully occupied.¹⁴⁶ Lord Cairns based his view on estimates of references from the Divisions and asked the Treasury to note that the referee would operate under a compulsory reference different from the Common Law Act Procedure 1854. The referees would be sitting from 10 a.m. until 4 p.m., about 200 days per year on an hourly fee basis which in Lord Cairns' words "would afford a wholesome check against any laxity of practice."

Cairns succeeded in obtaining funds for four referees¹⁴⁷ against Treasury opposition.¹⁴⁸ On the 18 February 1876, he confirmed the appointment of four Queen's Counsel to the Treasury: Mr J. Anderson,¹⁴⁹ Mr G. Dowdeswell,¹⁵⁰ Mr C. Roupell¹⁵¹ and Mr H. Very,¹⁵² albeit Lord Selbourne appointed Anderson in 1873.¹⁵³ There had been some delay and cases had already been referred to the referees.¹⁵⁴ On the 24th February 1876 the Treasury agreed to Cairns' proposal that the referees could appoint their own clerks

¹⁴⁵ LCO 1/73. [HPIM0455]

¹⁴⁶ LCO 1/73. [HPIM0457] the reason being the employment of the Chief Clerk of Chancery.

¹⁴⁷ Lord Selborne, had suggested three referees with a referee appointed to the Chancery Division.

¹⁴⁸ Letter. Laws to Graham.. LCO 1/73. 19/11/75.

¹⁴⁹ James Anderson QC was educated at Edinburgh University and was a member of the Faculty of Advocates of Scotland. He resigned as a referee because of bad health in 1886. He was a member of the Counsel of Legal Education, a Mercantile Law Commissioner, Examiner to the Inns of Court, Examiner in the Court of Chancery and stood as a liberal candidate contesting two Scottish constituencies in 1852 and 1868.

¹⁵⁰ In post 1876-89.

¹⁵¹ In post 1876-87.

¹⁵² In post 1876-1920.

¹⁵³ LCO 1/73. [HPIM0458]

¹⁵⁴ Letter Graham to Laws. LCO 1/73 12 November 1975.

as clerks of the High Court commensurate with the duties of the clerks to the Chief Clerks.

It was in this way that Lord Cairns secured the referees' position.

2.7. Importance of chambers business

As a postscript to the *First Report*, the *Selbourne Papers*¹⁵⁵ contain a Memorandum from Colin Blackburn one of the leading High Court judges of those times. In the context of the referees' role it is significant.

He states:

The new mode of pleading proposed will create a great deal of new and important

business to be transacted at Chambers in settling issues or otherwise.

Much of the success of the new Scheme must depend on how this is worked and it cannot therefore I think be properly delegated to Masters.

I do not see how it can be satisfactorily disposed of unless these judges regularly attend at Chambers. It certainly would require more than one judge at Chambers.....

Required for sittings *in banc* 9 judges

For *nisi prius* in London and Middlesex 6 judges

For Chambers 3 Judges
18 judges

The conclusion I draw is that the present number of 18 judges should not be diminished.

Colin Blackburn
31 March 1873

Whilst referees are not expressly mentioned by Mr Justice Blackburn the important issue here is that the new business would require a judge in chambers not a master in chambers to settle issues.¹⁵⁶ This idea juxtaposes Newbolt's later conception of "discussions in chambers" to resolve issues in some matters. Just what Mr Justice Blackburn had in mind is unclear but most probably not what Newbolt invented. However the idea may well have been to deal with quite a number of issues that might otherwise have wasted time at trial.

¹⁵⁵ 84.M.S. 1865. f.259 *Personal and Political Correspondence of Lord Selbourne*. 26 June 1872-17 May 1873. Lambeth Palace Library. *Memorandum as to the number of judges required for the business now transacted in the Common Law Courts and the new business proposed to be created by the Bill.* (Judicature Act 1873)

¹⁵⁶ Prior to the Superior Courts (Officers) Act 1837 the masters' work in chambers was carried out by the judges.

2.8. Legacy of the Commission

Despite Lord Selbourne's visionary objectives, and the careful deliberations of the Judicature Commissioners, there were subsequent problems. The intended results were not achieved in several respects.

Writing anonymously to *The Times* on the 10 August 1892¹⁵⁷ Lord Bowen regretted the drift of commercial work to arbitrators because it was quick and cheap, but not necessarily right in law. This had been one of the criticisms of the Commissioners and what they sought to avoid by creating the referee's office. Lord Bowen mentioned two fundamental considerations to men of business:

The first is-money. "How much is it likely at most to cost?"

The second is-time. "How soon at the latest is the thing likely to be over?"

He then wrote:

The one supreme attraction which draws merchants and traders into the circle of such grotesque justice is that it is prompt, it is cheap, that there are (or were until Lord Bramwell spoilt the innocent pleasures of all arbitration rooms by his recent Act of Parliament) no Appeal Courts, no House of Lords in the background, "no fresh fields and pastures new" of litigation, stretching in interminable prospect.

Lord Bowen's reservation was concern about "grotesque justice" practised by commercial arbitrators. The Commission's invention of the referee was intended to avoid that problem by the appointment of experienced Queen's Counsel exercising High Court judge powers. His other concern was the delay and cost of proceedings which Newbolt's "Scheme" was designed to reduce.

However, apart from the criticism of Lord Bowen, we note from this literature review in this chapter:

1. a recognition that the provision of separate remedies in separate courts created unnecessary cost and delay, as well as duplicity and contradiction, in judgment at the expense of the litigant;
2. a further recognition that the pre-1876 court organisation and machinery of justice could not cope with the influx of work on the 1866 scale where 133,160 writs were issued;
3. that the experience of Chancery practice, and the Common Law Procedure Act 1854 suggested a possible solution to the backlog of cases;
4. that the disillusionment of commercial men with arbitration in the 1860s influenced the Commission in their invention of the referee's function and subordinate office.

¹⁵⁷ *The Times*. Wednesday, August 10 1892 p.13.

5. that by the 1890s commercial men were disillusioned with the 1870 model;
6. that the referees would dispose of cases more efficiently than a jury;
7. that the referees could relieve the High Court judiciary of technically complex factual cases requiring a detailed enquiry or local investigation;
8. that the Commissioners encouraged a more efficient process regarding cost and delay, as well as suggesting new instruments of micro management, such as “statements of issues” and Preliminary Issues.

It may be argued that without the macro-reforms of the Commission (1867-69) embodied in the Judicature Acts 1873-75, Newbolt’s “Scheme” might never have been invented. At micro, or referee level, it was undoubtedly the flexible powers conferred on the referee that facilitated Newbolt’s experiments in caseload management and enabled a more activist approach.

2.9 The growth in referral business

We may argue that micro-caseload management was an inevitable development because of the rearrangement of business in the High Court and the unique jurisdiction that devolved on the referees as a result. Such jurisdiction as described below gradually evolved.

By reference to Table T.2.3 below we find that in 1880 referee caseload increased by 52 per cent on 1879 figures,¹⁵⁸ and that the 1890 caseload was more than four times the 1878 caseload demonstrating a strong growth in business.

In 1880 most of the referrals were of values between £200 and £100¹⁵⁹ but by 1897 the *Returns* indicate that the referees had three cases of a value exceeding £5,000: the administration of an estate, a building case, and a sale of goods case. Such growth in business in the late nineteenth century may be illustrated by the following table:¹⁶⁰

¹⁵⁸ The number of defended cases increased from 44 in 1879 to 76 in 1880, a 72% increase.

¹⁵⁹ *Return of Judicial Statistics 1880*.

¹⁶⁰ *Return of Judicial Statistics of England and Wales 1878-79*. [C.2418]. Image 170 of 264; 1890 [C.6443]; 1895 [C.8536]; 1900 [Cd 181] for 1898 (Part 2 *Civil Statistics*)

Table T. 2.3 Annual referrals 1876-98¹⁶¹

Year	Referrals
1876-77	78
1877-78	70
1878-79	91
1879-80	139
1888-89	277
1889-90	313
1896-97	267
1897-98	262

Source: *Returns of Judicial statistics 1876-98*

In the absence of contemporaneous judicial records¹⁶² the nature of the cases referred may be described by reference to categories of reported cases and archival material. From this analysis a disparate jurisdiction becomes apparent.

Property cases

Here the reports confirm that matters adjudicated comprised: boundary disputes,¹⁶³ enquiry into damages for breach of a lessor's covenant to supply a specified quantity of water per day,¹⁶⁴ an enquiry as to quantum of damages for interference with ancient lights,¹⁶⁵ action for damages for breach of covenant to repair,¹⁶⁶ enquiry into assessment of damages for value and quantity of minerals taken from farm and compensation as way leave for use of roads and passages,¹⁶⁷ assessment of damages for failure to carry out tenant's repairs under repairing covenant,¹⁶⁸ assessment of balance due following a decree for successive redemption of mortgages,¹⁶⁹ action by landlord against tenant and by tenant against sub-tenant in respect of dilapidations,¹⁷⁰ direction for an account of minerals taken from property,¹⁷¹ action for damages for breach of covenant to deliver up premises in repair,¹⁷² action for account on a mortgage,¹⁷³ matters of account in disputes

¹⁶¹ See Appendix p. 18 for example of case types *Return of Judicial Statistics of England and Wales 1880*

¹⁶² No records exist of court files prior to 1944 in the National Archives save file J141/326 *Official Referees: Directions by the Senior Master* which is referred to subsequently.

¹⁶³ *Lascelles v Butt* 2 Ch Div. 588

¹⁶⁴ *Turnock v Sartoris* 43 Ch Div. 150 1889.

¹⁶⁵ *Presland v Bingham* 41 Ch Div 268

¹⁶⁶ *Proudfoot v Hart* 25 QBD 42.

¹⁶⁷ *Phillips v Homfray* 24 Ch. D. 439.

¹⁶⁸ *Tucker v Linger* 21 Ch Div. 18.

¹⁶⁹ *Union Bank of London v Ingram* 20 Ch Div 463 (1882)

¹⁷⁰ *Hornby v Cardwell; Hanbury (Third Party)* 8 QBD 329

¹⁷¹ *Jenkins v Bushby* [1891] 1 Ch. 484.

¹⁷² *Joyner v Weeks* [1891] 2 Q.B. 31

¹⁷³ *In re Piers* [1898] 1 Q.B. 628

between spouses as to property rights,¹⁷⁴ damages for breach of repairing obligation regarding assignment of reversion expectant on determination of tenancy,¹⁷⁵ damages for illegal distress,¹⁷⁶ partitioning of joint family property,¹⁷⁷ claims for damage to leasehold property,¹⁷⁸ a claim for damages by mill owners for loss of riparian rights taking water from a river for the purpose of driving condensing low pressure steam-engines¹⁷⁹.

Commercial cases

Referrals also comprised commercial cases consisting of: actions for accounts on money-lending transactions,¹⁸⁰ assessment of damages for breach of agreement to purchase machinery on the expiry of a Lease,¹⁸¹ assessment of damages for value of goods sold by enemy alien during war,¹⁸² inquiry into damage for cost of repair of taxicabs,¹⁸³ action for an account on money-lending transactions,¹⁸⁴ trial determining whether goods of merchantable quality,¹⁸⁵ enquiry into quality of hops from Pacific Coast,¹⁸⁶ questions as to damages for breach of commercial agreement for Anglo-American trading partners,¹⁸⁷ value of goods not returned under bailment,¹⁸⁸ assessment of damages for conversion of goods disposed of through fraud,¹⁸⁹ and an assessment of damages for delay in supply of plant for laundering and dyeing works.¹⁹⁰

¹⁷⁴ *In re Married Women's Property Act 1882. In re Questions Between W.A. Humphrey and H.A. Humphrey* [1917] 2 KB 72 per Scrutton L.J. at p.74. Question as to whether Ridley J., a former referee could delegate matters under Section 17 to the referee where it was not a matter of account and neither party would consent to that course. Cozens-Hardy M.R. considered that Ridley J. had exceeded his powers in so referring the whole matter to a referee.

¹⁷⁵ *Cole v Kelly* [1920] 2 KB 107

¹⁷⁶ *Davies v Property and Reversionary Investments Corporation* [1929] 2 KB 223

¹⁷⁷ *Anantapadmanabhaswami v Official Receiver of Secunderabad* [1933] AC 396 whilst not an English case but a Madras High Court case, it confirms that the Official Referee was also a judicial office in British India at the time. They had similar jurisdiction.

¹⁷⁸ *Elder v Auerbach* [1950] 1 KB 373

¹⁷⁹ *Ormerod and Others v The Todmorden Joint-Stock Mill Company (Limited)* [1882] 8 QBD 664

¹⁸⁰ *Burrard v Calisher* [1878] 19 Ch.

¹⁸¹ *Marsh v James* 40 Ch Div 563.

¹⁸² *Jebara v Ottoman Bank* [1927] 2 KB 254 Appellant claimed sterling payment for goods under Article 84 Treaty of Lausanne and Treaty of Peace (Turkey) Act 1924 for goods sold by Ottoman Bank in Beirut during war at the exchange rate before the war and not at fluctuating piastres (Ottoman currency) rates.

¹⁸³ *Albemarle Supply Company Limited v Hind and Company* [1928] 1 KB 307

¹⁸⁴ *Burrard v Calisher* 19 Ch Div. 644.

¹⁸⁵ *Jackson v Rotax Motor and Cycle Company* [1910] 2 KB 937

¹⁸⁶ *Biddell Brothers v E Clemens Horst Company* [1911] 1 KB 934

¹⁸⁷ *Rose and Frank Co v J.R. Crompton and Bros* [1923] 2 KB 271 In this action order was made by the Master that the action be transferred to the Commercial List and that all questions of damages that became material would be transferred to an Official Referee.

¹⁸⁸ *Rosenthal v Alderton and Sons* [1946] KB 375 appeal from H.H. Trapnell K.C.

¹⁸⁹ *Beaman v A.R. T.S.* [1949] 1 KB 550 appeal against Denning J upheld. Trial limited to question of damages referred to Official Referee.

¹⁹⁰ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 529

Ecclesiastical cases

Amongst cases referred there is reference to an action for an account to recover arrears of pension under the Incumbents Resignation Act 1871.¹⁹¹

Business Law

Some evidence is found of references of a business nature such as a partnership action determining distribution of partnership property on dissolution,¹⁹² an action for breach of agreement transferring stock of a railway company and transfer of engineering sub-contract for the construction of a railway line,¹⁹³ and an assessment of damages due to company agent for breach of agreement by company.¹⁹⁴

Chancery matters

These included an action on an account in relation to administration of an estate,¹⁹⁵ action by executors to recover monies paid by testator to defendant and assessment of monies due to executors,¹⁹⁶ a direction to take an account of monies due to beneficiary from trustee of Ceylonese estate¹⁹⁷ and an action by an art dealer against an Estate in respect of 24 pictures.¹⁹⁸

Tort actions

These included an assessment of costs due to a plaintiff in respect of a defendant's unlawful action in maintaining an action through a common informer,¹⁹⁹ an assessment of damages in respect of embezzlement and conversion of sawdust.²⁰⁰

Construction and Engineering

The referees gradually assumed specialist jurisdiction over what High Court judges loosely termed "bricks and mortar" cases.²⁰¹ This work encompassed: a declaration as

¹⁹¹ *Gathercole v Smith* 7 QBD 626

¹⁹² *Potter v Jackson* 13 Ch Div 845.

¹⁹³ *Miller v Pilling* 9 QBD 736.

¹⁹⁴ *Reigate v Union Manufacturing Company (Ramsbottom) Limited and Elton Cop Dyeing Company Limited*. [1918] 1 KB 592.

¹⁹⁵ *Lady de la Pole v Dick* 29 Ch Div. 351.

¹⁹⁶ *Baroness Wenlock v River Dee Company* 19 QBD 158.

¹⁹⁷ *Rocheffoucauld v Boustead* [1897] 1 Ch 213

¹⁹⁸ *Rowcliffe v Leigh* [1876] 4 Ch Div. 661 One of the first cases to be referred where the Vice Chancellor of the Chancery Division ordered the case to be tried before an Official Referee as distinguished from the related action of *Leigh v Brooks* [1876] 5 Ch Div 592 regarding the sale by the defendant to her testator of 130 pictures for prices amounting in the whole to £50,000 with an allegation of fraud. Because of the fraud question the matter was referred to a High Court judge to deal with in open court.

¹⁹⁹ *Bradlaugh v Newdegate* 11 QBD1 where Coleridge L.C.J. ordered the, defendant, an M.P., to pay the plaintiff's costs arising through MP's maintenance and champerty of informer's action against Mr Bradlaugh who refused to take the oath in Parliament.

²⁰⁰ *Rice v Reed* [1900] 1 QB 54

²⁰¹ Anecdotal evidence given to the author by a T.C.C judge.

to conclusiveness of surveyor's certificate,²⁰² action for moneys due under building contract and counter claim for defective building works,²⁰³ assessment of damages in respect of contractor obstructing highway with temporary electric tramway,²⁰⁴ reference determining delay in delivering possession of site for building works,²⁰⁵ time in which to complete building works after Practical Completion.²⁰⁶

Employment

This included a reference for the ascertainment of a fair wage.²⁰⁷

Marine

There are references enquiring into circumstances causing delay in the unloading of a vessel in port,²⁰⁸ and an assessment of damages for repairs to a schooner in collision with barge.²⁰⁹

Patents

Patent matters referred related to an enquiry into damages for infringement of a patent,²¹⁰ assessment of damages for infringement of patent,²¹¹ a determination of the novelty of patented specification concerning interlocking apparatus for railway points and signals,²¹² and the determination of costs as a result of Crown infringement of patented inventions.²¹³

This diverse workload is further illustrated in the Appendices which contain schedules describing the types of case referred and in certain cases the element of the "Scheme."²¹⁴ In 1947, Eastham sent²¹⁵ a Memorandum²¹⁶ to Lord Jowitt, then Lord Chancellor, confirming that the referees also dealt with claims for: forfeiture, breaches of repairing covenants, injury reversion, injunctions, fraud and conspiracy, damage by

²⁰² *Richards v May* 10 QBD 400.

²⁰³ *Lowe v Holme and Anor.* 10 QBD 286.

²⁰⁴ *T Tilling Limited v Dick Kerr & Co Ltd* [1905] 1 KB 562

²⁰⁵ *Porter v Tottenham Urban Council* [1915] 1 KB 778

²⁰⁶ *Joshua Henshaw and Son v Rochdale Corp* [1944] KB 382

²⁰⁷ *Hulland v William Sanders & Son* [1945] KB 78 where Humphreys J. held plaintiff entitled to recover under Art 5, para 1 Conditions of Employment and National Arbitration Order 1940 such amount to be ascertained by an Official Referee.

²⁰⁸ *Kay v Field & Co* 10 QBD 241.

²⁰⁹ *Rockett v Clippingdale* [1891] 2 QB 31

²¹⁰ *American Braided Wire Company v Thompson.* 44 Ch Div. 275. Mr. Justice *Kekewich*, at the trial of the action, held that the Plaintiffs' patent was invalid; but his judgment was reversed by the Court of Appeal, who directed an inquiry as to what damages had been sustained by the Plaintiffs by reason of the infringement of the patent by the Defendants, and this decision was affirmed by the House of Lords. The inquiry as to damages was by consent referred to an Official Referee

²¹¹ *Cropper v Smith* 26 Ch Div. 700.

²¹² *Saxby v The Gloucester Wagon Company* 7 QBD 305

²¹³ *In re Letters Patent No. 139,207. In re Carbonit Aktiengesellschaft.* [1924] 2 Ch Div53.

²¹⁴ See Appendix : *Judges Notebook Analysis* pp. 6-128

²¹⁵ LCO 4/153 [HPIM 0789/0790] Letter Tom Eastham QC to Lord Jowitt 28th January 1947.

²¹⁶ LCO 4/152 [HPIM 0791] Memorandum from Official Referees to Lord Chancellor

enemy air-raids²¹⁷, subsidence of coal mines²¹⁸, pollution of rivers and fishing rights, costs of plant and machinery, public works, defective machinery,²¹⁹ and conflicts of evidence between architects and surveyors²²⁰.

We may infer from this that whether the referees were dealing with questions of riparian rights or fixing an exchange rate of Ottoman currency the pressure of a diverse and increasing caseload necessitated the pioneering of new judicial techniques.

2.10. Conclusions at macro-level-general

The first research question is why the office of referee was invented and what caused and facilitated caseflow management. Those reasons have been given at 2.4 and 2.5.

The office was created against a background of fundamental procedural reform and codification and unification of the procedural and administrative system. The Judicature Commissioners attempted to provide for the more speedy economical and satisfactory despatch of the judicial business transacted by the courts. In that they realigned the jurisdiction of the courts and made provision for equitable remedies in the courts of Common Law and abolished the Courts of Common Pleas and Exchequer, replacing Exchequer Chamber with the Court of Appeal they succeeded in streamlining the system. Whilst *The Times* was correct in its Leader²²¹ in saying:

The report of the Judicature Commission, to which we recently drew the attention of readers, will, we are confident, mark the beginning of a new period of legal history. The influence which it is destined to exercise is not to be measured by the force with which the inconveniences of the present system are portrayed, nor even by the specific recommendations which it contains. It is the sanction of the high official authority which it possesses that constitutes this document a powerful lever of reform.

Undoubtedly the “high authority” provided “a powerful lever of reform,” which included the creation of the referee. But an anonymous former member of the Judicature Commission, reputed to be Lord Bowen, wrote:²²²

Recent legislation has, without doubt, effected many most important and valuable improvements; but the system, as administered, amounts to a denial of justice to all prudent persons as respecting claims for a moderate amount, and in all cases causes expense, uncertainty and delay most disappointing to at least one

MEMBER OF THE JUDICATURE COMMISSION
London, August 10.1880.

²¹⁷ LCO 4/152 [HPIM 0801] Letter Senior Official Referee Charles Pitman to Senior Master V Ball (KBD) 9 December 1943 confirms numerous war damage claims referred to Official Referees.

²¹⁸ LCO 4/152 [HPIM 0796] This case involved 130 pages of pleadings.

²¹⁹ LCO 4/152 [HPIM 0796-0799]

²²⁰ LCO 4/152 [HPIM 0791-94] Memorandum. Eastham to Lord Chancellor undated. Rough Draft.

²²¹ *The Times*. 22 April 1869 p.8. Issue 26418; col F

²²² *The Times* 16 August 1880 p. 11 Issue 29961; col G

Thus such a high powered judicial forum had generally failed to solve the delay and expense problem. It was their failure like that of many other procedural committees that became the catalyst for Newbolt's procedural innovations.

2.11. Conclusions at macro-level-specific

We may answer the first research question and may draw the following conclusions from the above literature review:

1. The overall objective in the words of the Judicature Commission was:

The duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.²²³

2. That the office of referee was created to avoid the problems posed in certain cases of referrals under the Common Law Procedure Act 1854 as explained by the Lord Chancellor and the Solicitor General in 1873.
3. The referee was a type of arbitrator with the added advantage of being a court officer under the supervisory jurisdiction of a High Court judge. It was thought that this would prevent the abuse of delay through adjourned hearings and that the referees would sit continuously from day to day until the cases were completed;
4. The referee was the invention of the Judicature Commission 1867-69.
According to Holdsworth the Judicature Commissioners avoided the problem of referrals to arbitrators under the Common Law Procedure Act 1854 by recommending compulsory referrals. This precluded the "scandal" of that statute.
5. This Judicature Commission regarded the jury trial as inappropriate in technically complex and scientific cases, or where the court considered referral to a referee more appropriate.
6. What caused and facilitated a form of caseload management was the dramatic increase in actions in the 1860s, and in the Attorney General's words, a system founded in the Middle Ages, that "was incapable of being adapted to the requirements of modern times."²²⁴ An administration of justice that harboured an acute backlog of cases in the High Court and the "scandal" of non-compulsory references, not only led to the creation of the Supreme Court in 1873, but also eventually to referee caseload management.

²²³ n.4. p.13

²²⁴ H.C. Deb. Vol CCVI. col. 641

7. Enquiry and report by a referee were compulsory under Section 56 Judicature Act 1873.
8. Under Section 57 the parties might consent to a referral or otherwise the referral was compulsory where the case was of a scientific or technical nature; these provisions avoided the “scandal” of the earlier Act which led to arbitration.
9. The procedural improvement introduced by Lord Selbourne in the Judicature Bill 1873 was the transfer of cases from one court to another. This had particular utility in the case of the referees because without this process the new system would have run into difficulty with heavy complex cases before High Court judges clogging the lists.
10. A variety of cases were referred to the referees requiring investigation and understanding of highly complex scientific and technical matters. In the main they were actions in contract and tort.

2.12. Conclusions at micro-level

We may also conclude that:

1. The Judicature Commission recommended a court system with three modes of trial capable “of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried.”²²⁵
2. The adjustment of the parties’ rights is a key factor here in that the Judicature Commission intended that they be adjusted “in the manner most suitable to the nature of the questions to be tried.” That “most suitable” manner implies that the traditional judicial approach may not have been appropriate in all cases where subordinate judicial officers were working on heavy factual cases. The words imply a more flexible approach and if that hypothesis is right then some of the argument of traditionalists, that judges must not be involved in settlement, might be subject to question.²²⁶ Certainly, the way Newbolt interpreted his role as a referee questions the idea of a detached judge unconcerned with settlement. It is submitted that a passive as opposed to an activist approach appears counter to the central objective of the

²²⁵ Order 36 Rule 2 RSC 1875 provided for five modes of trial by: one or more judges; a judge with assessors; a judge and jury; an official or special referee with assessors and a referee alone.

²²⁶ This is principally the argument advanced in support of the view that judges must not intervene to encourage settlement. See for example: O.Fiss. ‘Against Settlement.’ (1994) 93 Yale Law Journal 1073

Commission to procure “the more speedy economical and satisfactory despatch of the judicial business transacted by the courts.”²²⁷

3. Supporting that wider interpretation of the referees’ role is the provision the Judicature Commission made in respect of referees visiting the scene or the site. This was a considerable departure from the judge in the courtroom. It is significant that this element of micro-caseflow management was invented by the Commission itself and put to excellent effect by Newbolt, Eastham and their colleagues. Many cases were settled after such visits.
4. Also significant was the linkage between referees as judges and experts and assessors. Again as a result of this Newbolt devised better ways of using experts in a case managed role.
5. Pleadings were the subject of heavy criticism by the Commissioners and they recommended “a statement of issues for trial.” This, if necessary, would be settled by the judge. In many referee cases on preliminary issues there are instances of such matters arising as preliminary questions in keeping with the recommendations of the Commissioners.
6. What the Commissioners sought to achieve at macro-level, Newbolt subsequently sought to achieve at micro-level.

What we therefore find in the Commission’s *First Report* is the framework for the evolution of a form of subordinate judicial activism or micro-caseflow management.

²²⁷ n.4, p.13.

CHAPTER 3

RUDIMENTARY PROTOTYPES IN CASEFLOW MANAGEMENT TECHNIQUES (1919-49)

3.1 A beginning

This Chapter explores the contemporaneous documentary evidence relating to the invention of rudimentary caseflow management techniques as practised by Sir Francis Newbolt in the 1920s and subsequently. Here we focus on: Newbolt's "Scheme" and the reasons for it; an assessment of its impact, and the extent to which it promoted earlier settlement and saved costs.

This chapter supports the theory that rudimentary case management existed in the 1920s, and was a significant factor in the resolution of cases in this court. This is accomplished by way of a literature review and qualitative analysis of archival materials retained at the National Archive and Newbolt's publications.

3.1.1 Sir Francis Newbolt

Like Lord Selbourne, Newbolt came from a religious background being the second son of the Vicar of St Marys in Bilstone, born 21 November 1863. He was educated at Clifton, and later at Balliol College Oxford where he read Natural Science (Chemistry) obtaining honours in 1887. He read law with Sir Thomas Wilkes Chitty, his brother-in-law and a leading authority on Common Law procedure. He was called to the Bar by the Inner Temple in 1890 and joined the Western Circuit. He remained in Wilkes Chitty's Chambers for 10 years but did not enjoy an extensive practice. He took Silk in 1914. While at the Bar he continued his interest in science and gave over 1,000 experimental science lectures in board schools. He became Recorder of Doncaster in 1916, and a Chancellor of the Diocese of Exeter and Bradford and Chairman of the Devon Quarter Session. He became a referee after Sir Henry Verey's resignation in 1920. He was President of the Norwegian Club from 1920 to 1926 and an honorary member of the Land Agents Society. He was also an accomplished etcher and the author of a number of books in law, art and literature.²²⁸

²²⁸ *The Times* 9 December 1940 p.7; Issue 48794: col. E.

3.1.2 Lord Birkenhead

The Lord Chancellor who appointed Newbolt was, F.E. Smith, Lord Birkenhead. He is a key figure in this study because it was he in government with whom Newbolt first corresponded about his “Scheme.” Birkenhead was an energetic Lord Chancellor and scholar of Wadham College, Oxford. He is said to have been a model of “sober correctness”²²⁹ who never pretended knowledge which he did not have. Birkenhead supported the reform of civil procedure and land law. He attempted to reform the outdated circuit system undertaking some preliminary work on the Supreme Court of Judicature (Consolidation) Act 1925. He improved the tenure of county court judges paving the way for the County Courts Act of 1924.²³⁰ His research assistant was Sir Roland Burrows who later wrote the article about the work of the referees in the *Law Quarterly Review*²³¹ in 1940.

At this time the referees involved apart from Newbolt, were Sir Edward Pollock QC and George Scott, and later Sir William Hansell – the last said to be very capable.²³²

3.1.3 Sir Edward Pollock

Sir Edward was one of 24 children of Lord Chief Baron Pollock born 1 February 1841.²³³ In 1863 he became a member of the Royal College of Surgeons and subsequently a Fellow. He was called to the Bar by Inner Temple in 1872. He enjoyed a varied commercial practice and was responsible for the 8th Edition of *Russell on Arbitration and Award* published in 1900. He was a member of a Committee of Experts appointed by the Foreign and Colonial Office in 1910 to review the work of international commercial arbitration and to ensure that British commerce enjoyed the same privileges as foreign commerce in respect of enforcement of awards abroad.²³⁴ *The Times* said that Pollock made an excellent referee and was remarkably quick in seizing on all the essential facts and figures of a case. His geniality made it a pleasure to appear before him. He was also a member of the Royal Institution and the Anglo Finnish Society.²³⁵

²²⁹ R.F.V. Heuston *Lives of the Lord Chancellors 1885-1940* p.382 (Oxford: Clarendon Press, 1964)

²³⁰ n.229 above p.383

²³¹ n.15.

²³² In post 1927-31.

²³³ *The Times* Obituary 16 April 1930; p.16 Issue 45489; col C.

²³⁴ *The Times*. 6 June 1910, p.10. Issue:39291. col.D

²³⁵ *The Times*. 15 December 1923, p.11. Issue:43525. col.B

3.1.4 Sir Tom Eastham

Eastham succeeded Newbolt in November 1936 as the Senior Official Referee. He was educated at Manchester Grammar School and Owens College Manchester. He studied at St Bartholomew's Hospital and took his degree in medicine at Manchester University. He was called to the Bar in 1904 practising at the Common Law Bar and on the Northern Circuit and built up a substantial London practice. He took Silk in 1922. From 1924 to 1936 he was Recorder of Oldham. He was a Deputy Chairman of Surrey Quarter Sessions from 1940 to 1954 and Chairman from 1943 to 1955 with the petty sessions at Dorking. He became Senior Official Referee in 1944 and whilst still in office in 1948 was appointed Commissioner of Assize on the Wales and Chester Circuit. *The Times* noted in his obituary²³⁶ that it was rare for judicial officers to be able to improve materially the position of themselves or their colleagues.

3.1.5 Sir William Hansell

He was educated at Charterhouse and Christchurch Oxford and took honours in the Classical Schools graduating in 1880. He was called to the Bar by Inner Temple and devilled for Roland Vaughn Williams the future Lord Justice. He assisted Vaughn Williams with the text book *Williams on Bankruptcy*. Hansell was the virtual author of its later editions. He became the leading authority on this branch of the law and took up a standing appointment as Counsel to the Board of Trade in bankruptcy matters. Hansell was a high churchman. He did some ecclesiastical work and had a good general practice. In 1917 he became Recorder for Maidstone. He took Silk in 1927 at the age of 71. A few weeks later on the retirement of Sir Edward Pollock (age 86) Lord Cave appointed Hansell to fill Pollock's vacancy. Hansell was in post until 1931 and a year later was appointed as a Commissioner of Assize for the North Eastern Circuit. In 1933 he was elected Treasurer of the Inner Temple. He died in 1937.²³⁷ It may be significant that in Lord Sankey's time²³⁸ Bosanquet sent a Memorandum compiled by Pitman²³⁹ and himself (both appointed as referees by Sankey). That stated:²⁴⁰

.....For many years the work of the Official Referees' Courts was of comparatively small importance, but following upon the appointment of Mr (afterwards Sir) Edward Pollock in 1897, and later during the tenure of office of Sir William Hansell, the work of these Courts has steadily developed and increased in amount and importance.

²³⁶ *The Times*. 12 April 1967.p.12.Issue:56913.col.g

²³⁷ *The Times*. 20 April 1937.p.22.Issue:47663.col.D

²³⁸ 1929-35.

²³⁹ Official Referee 1933-1945.

²⁴⁰ LCO 4/152. (HPIM 0646-HPIM 0649)

3.1.6 George Scott K.C.

George Scott served as a referee from 1920 to 1933 and is noted as being the inventor of the Scott Schedule.²⁴¹ This schedule was adapted from the surveying practice of dilapidations schedules and utilised for cases of defective work giving descriptive details of the works, the cost of remedy and description of the repair required.

For all of these referees, salary and numbers²⁴² remained a grievance as they saw these elements as dissuading more successful barristers from applying for such posts.²⁴³

Having considered the personalities involved we turn to consider my theory and its application to their work.

3.2 Definition of theory

The thesis examines whether micro-caseflow management in this court and informal resolution in the referee's chambers facilitated the more efficient and effective work of the Court. The theory is demonstrated by examples of judicial activism and sometimes by a passive approach undertaken by Newbolt's successors. The theory is tested in subsequent chapters, concluding that Newbolt's "Scheme" was effective by means of a combination of formal and informal court processes in resolving certain types of complex technical dispute earlier saving time and cost to the litigant.

3.3 Micro-caseflow management

The early evidence of micro-caseflow management discussed here may be defined as the consensual exercise of subordinate judicial power outside the traditional scope of judicial powers practised by the referees to attain expedition and economy in litigation. Upon analysis of the archival materials seven elements of this rudimentary form of micro-caseflow management were identified:

1. Special procedures in chambers enabling informal referee resolution and early settlement;
2. Referee intervention at various stages of the process to effect settlement;
3. The use and invention of the single joint expert/court expert;

²⁴¹ n.20 p.70.

²⁴² Lord Cairns and the Heads of Divisions had considered that they would need at least four referees but the Treasury would not agree. LCO 4/152 [HPIM 0450]

²⁴³ Referees salaries were then £1,500 and had not been increased since 1873. The number of cases referred had quadrupled after the First World War. When Lord Cairns wrote to the Treasury on 12 November 1875 to request the Treasury to suggest referees might be paid more than £1,500 the proposal was rejected by the Treasury.[HPIM 0445]

4. The use of a “proportionate” approach to costs so that the costs of the case should bear some reasonable relationship to the value of the item in dispute;
5. The invention of special forms of submission such as a Referee’s or Scott Schedule which replaced pleadings;
6. The formulation of preliminary issues or questions for the court;
7. Flexibility as to the place of hearing at more economic locations and attendances on site.

These elements of rudimentary caseflow management and referee alternative resolution are examined in more detail subsequently to explain how and why all this came about in the 1920s in this court pre-dating notions of case management and proportionality as well as ADR by more than half a century.²⁴⁴

3.4 Events leading to the invention of case management and judicial settlement

We recall from chapter 2 that the architects of the 1873 judicature reforms declared their intention to replace commercial arbitration with a court managed referee system. We also suggested that the referral of cases from Queens Bench and Chancery Divisions to referees was a form of macro-caseflow management, realised through Section 3 of the Common Law Procedure Act 1854. The referees, in particular, Newbolt played a pivotal role in this judicial revolution.

The philosophy underlying Newbolt’s “Scheme” was clearly set out in his seminal article and his concluding remarks in the *Law Quarterly Review*:²⁴⁵

A true function of the Court, it is submitted, is especially in the commercial cases under consideration, not to conciliate or exhort the parties, as is sometimes suggested much less to hurry them, or to deprive them of a perfect freedom of action, but to use the available machinery of litigation to enable them to settle their disputes according to law without grievous waste and unnecessary delay and anxiety: and in particular to show them how this, if desired, may be accomplished. The only so called concessions which the parties can be said to make are made not only voluntarily, but in their own direct pecuniary interest. This has little, or nothing, to do with the common place saying of ordinary life that a man loses nothing in the long run by forbearance, fair dealing or generosity.

But the essence of this early evolution of case management lay in the function of the referee, his multi-function role being derived from: that of a master to whom matters were referred under the Common Law Procedure Act 1854; a judge of the High Court in

²⁴⁴ ADR did not really establish itself as an alternative to litigation until after 1976, regarded by some as a turning point in legal history. That was the year of the Pound Conference at St Paul, Minnesota on: *Perspectives on Justice in the Future* and Chief Justice Warren Burger’s pejorative as to whether there was not a better way.

²⁴⁵ n.2 p. 427.

terms of powers subsequently conferred after 1876; an arbitrator in terms of the referees' early use of directions after issue of the writ, and finally a juryman's role²⁴⁶ where he would deal with trials of fact as "a jury". It may be argued that the utility of Section 3 Arbitration Act 1889 enabling parties to appoint a referee as an arbitrator by agreement²⁴⁷ was decisive in terms of using consent as a means to extend the referees official formal power. By consent of the parties the *Rules of the Supreme Court* could be waived and by party agreement the referee could sit in chambers and informally resolve the case. This revolution is clearly demonstrated in Newbolt's correspondence with Lord Birkenhead,²⁴⁸ in particular, his reference to "friendly business discussions" and in his article,²⁴⁹ where he refers to "an informal discussion in Chambers." This was an extraordinary process for these times and quite unconventional because judges never entered the arena, believing that if they did so they would be perceived to prejudice their impartial and independent position. It was a high risk strategy for Newbolt which caused Birkenhead some concern.

For present purposes it is only necessary to record what the development was and why it occurred in the context of the contemporaneous literature. In many respects the referee was a multi-functionary who bridged the void between a traditional Anglo-Saxon judicial culture based on the adversarial process, and the *laissez faire* business approach of the commercial man. The point was that adjudicating cases in a traditional manner was just not cost effective with the type of issues before the court and the voluminous evidence that referees had to analyse. What Newbolt worried about was the time spent on the case in proportion to its overall commercial value.

In the twentieth century the referees' role became more clearly defined. Their status was slightly increased by the acquisition of the non-jury list, and the abolition of rights of appeal on matters of fact. The referee's multi-function role was self evident from

²⁴⁶ Eastham's notebooks for the period 1940-49 reveal numerous illustrations of case management features especially in the period 1944-48. Cases included matters of account, disputes as to matrimonial property, war damage claims, dilapidations cases, building and engineering cases and questions of costs. The entries also reveal that this judge frequently sat outside London and was requested on some occasions to exercise power 'as a jury'.

²⁴⁷ To effect such appointment the arbitration agreement had to be lodged with the nominated referee's clerk and then entered in his list unless it was given a special appointment for hearing. The Award was published on payment of a court fee. Sched. 1, Section V, Supreme Court Fees Order 1924.

²⁴⁸ Letter: Newbolt to Lord Birkenhead's Secretary Sir Claude Schuster. 15 February 1922. LCO 4/152 [HPIM 0592]

²⁴⁹ n.2 p. 438

Sections 88 and 89 Judicature Act 1925.²⁵⁰ A considerable increase in referrals occurred in the 1880s and 1890s.²⁵¹

The abolition of the right of appeal from referees to the Divisional Court also added to their status as a court of first instance. Opportunity was afforded for case management at an early stage of the proceedings because referees had developed the practice of giving directions on an early summons for directions taken out after the issue of the writ and before close of pleadings. Crucial to this development in the early 1920s was the acquisition of the non-jury list from the Queen's Bench Division which radically increased referee workload by 65 per cent in the years 1919 to 1922.

3.5 Explanation of theory

It is argued in this thesis that following its invention in the 1920s case management and referee settlement positively affected the outcome of referrals. It is argued that were it not for Newbolt's approach and that of his colleagues there would have been much delay in the trial of cases and higher cost. If it is the case that Newbolt practised case management the question has to be asked whether that accounts for the apparent effect on caseflow in the period 1919-36. If it survived Newbolt's era, does it have any marked effect in the period 1947-70 for which periods judicial statistics are available?²⁵² If we consider the 18 years (inclusive) of the Newbolt period, the average percentile of disposals and settlements from 1919 to 1936 was 28 per cent of the referrals. If we take a similar period after the war 1947-64 the average settlement and disposal rate before trial is 19 per cent of the referrals. What these results tend to suggest is that the Newbolt era was a more activist time in terms of settlement and the post war period less activist.

The further detailed study and analysis in Chapter 5 of these periods, and the Minute Book analyses 1959-62 and 1965-67, confirm that there was a marked difference as a result of these measures in the respective periods.

²⁵⁰ Section 88 provided that where any case was to be tried with a jury the court could refer the matter to an Official or Special Referee for enquiry and report. Any question arising in any cause or matter other than a criminal proceeding by the Crown and further the report of an Official or Special Referee could be adopted wholly or partly by the court or judge and if accepted could be enforced as a judgment or order to the same effect. Section 89 Supreme Court Judicature Act 1925 applied where any cause or matter other than criminal proceedings could be tried by a referee, officer of the court, special referee or arbitrator if the cause or matter required any prolonged examination of documents or any scientific or local investigation

²⁵¹ See: Table T.2.3.

²⁵² n.51

3.6. Against the theory

Whilst there is clear direct contemporaneous evidence from the Lord Chancellors files at the National Archive and from judicial statistics as to the existence of this phenomenon and the effects of it there is no corroborative evidence in the most likely place – the *Rules of the Supreme Court* themselves. The *Annual Practice* of 1930 at page 640-641 headed *Notes on the practice before the Official Referees* states:

Once an order for reference to an Official Referee has been made the Solicitor's clerk shall enter the case with the Official Referees Clerk with the Writ and the Order for reference from the Queen's Bench Division or the Chancery Division. Directions will be given by the Official Referee and *all interlocutory proceedings given by him in his Chambers*²⁵³ including the issuing of Summonses, drawing up and dealing with orders and filing of documents. Summonses and applications will be heard by the Referee at 10.30am each day. Appeals against Interlocutory Orders will be referred to a Judge in Chambers.

Whilst there is no reference to any form of rudimentary caseflow management the note confirms that the referee was master of *all interlocutory proceedings*.²⁵⁴ That being the case the referee would have had every opportunity, in theory and in practice, for bringing some order to the case and encouraging a time and cost-saving timetable as well as a process tailor-made for the particular case. In the absence of any express reference to the case management theory discussed in this chapter reliance is placed upon the contemporaneous reports made by Newbolt and Eastham to Sir Claude Schuster K.C.,²⁵⁵ the Lord Chancellor's Permanent Secretary, and Eastham's surviving notebooks.²⁵⁶

3.7 Exposition of the basis for a theory: Newbolt's first report to the Lord Chancellor

The best evidence of this process is a report that Newbolt made to Lord Birkenhead in July 1920. Newbolt's letter enclosing it, and the report itself, formed the basis of what Newbolt later described as his "Scheme." Here we find some answers to our research questions raised in paragraph 1.6 (b) and (c).

²⁵³ Author's italics.

²⁵⁴ Author's italics.

²⁵⁵ Sir Claude Schuster K.C. was appointed by Lord Haldane because of Lord Haldane's other urgent duties. Lord Haldane contemplated that Schuster would be the right man to set up a Ministry of Justice. Schuster played a pivotal role regarding micro-caseflow management aspects. Schuster was the conduit through which the Lord Chancellor communicated with the Law Society, The Bar Council and the Bench as well as both Houses of Parliament. Schuster had a particular interest in what Newbolt was doing because of Schuster's involvement with a more efficient County Court procedure.

²⁵⁶ J114/1-8

Newbolt's covering letter to Schuster dated 5th July 1920 enclosing a report to the Lord Chancellor stated:

Dear Claude,

Here is the Report. It is cut down to its extreme limits to make itself read. I have shown it to no one.

I cannot, of course, say that any of the defects [in the system] are due to individuals, but I feel some surprise that my very simple expedients have not occurred to anyone before.

Today after I signed the report I had a case where the parties gladly agreed to have commission accounts examined by an independent accountant, this saving more than half of the time of trial.

Do please try and do something to improve our status more definite and dignified.

Yours,

F. Newbolt.²⁵⁷

This is not a polite letter asking for a judicial upgrade. This is a referee telling the Lord Chancellor of England that he has a problem with traditional procedures and the way to overcome it involves case management measures. There is something revolutionary here. An expert is not an advocate. He had no right of audience. There was no provision in the *Rules of the Supreme Court* for a court expert. This did not come about until 1934²⁵⁸ when Order 37A was amended. Newbolt invented the court expert and this is the evidence of it. He did it to expedite the process and save money: saving half the trial costs clearly demonstrated its success. Despite this Birkenhead's eventual reply in February 1922,²⁵⁹ referred to subsequently, cautioned about pressure from the Bench in settlement, but one can also infer Birkenhead's concern for what he called: "the waste of public time."

²⁵⁷ LCO 4/152. [HPIM 0559-0560]

²⁵⁸ RSC (No.2) 1934.

²⁵⁹ Letter: Schuster to Newbolt. 21 February 1922. LCO 4/152 [HPIM 0594]

Newbolt's full report is as follows:²⁶⁰

Confidential

5th July 1920

Official Referee's Court

No. 195

Royal Courts of Justice

I was appointed an Official Referee in April 1920 and had long been aware that there were serious defects in the business connected with this office. I am now informed that a brief report on the matter would be acceptable.

The defects fall under 3 heads:

1. Those which are noticeable in all litigation in the courts;
2. Those which are due to the personality of the Referees, and their want of status procedure and position; and
3. Those which are due to the present practice in this Court.²⁶¹

The result of all these combined is that the volume of the business is not what it should be, and a vast number of disputes go to private arbitration instead of any to the Courts.

The reasons given generally for preferring a lay arbitration are that (1) it is a much cheaper tribunal; and (2) much more expeditious; (3) a lay arbitrator is chosen who belongs to the particular trade in which the dispute arises, or is an experienced solicitor or chartered accountant; and there is practically no appeal.

Here I say incidentally suggest that it is an anomaly that the appeal from a referee may go as of right to the Court of Appeal, and the House of Lords, but it must first pass through the Divisional Court. It seems difficult in these days to justify this extra proceeding in appealing against the decision of one who has all the powers of a High Court judge.

From the legal and logical point of view, indeed from almost any point of view, a lay arbitration is open to the gravest objections. Whenever a motion to set aside an award is made gross irregularities, often amounting to a denial of justice, are disclosed. These are well known, and indeed not enlarged upon, but the fact remains that the attraction of a cheap and speedy decision is so great that more important matters are overlooked. The natural desire to have a judge who understands trade customs will be dealt with later.

The first question then is how the present procedure can be cheapened and accelerated.

There is much room for improvement. I am informed that the list left to me by my predecessor will occupy my Court for a year, and some of the cases

²⁶⁰ LCO4/152. [HPIM 561-567 and CIMG 0008]

²⁶¹ LCO 4/152 [HPIM 0561]

which I have already dealt have been over a year-one or two over a year and a half-on the way to trial.

During the last few days 3 cases have been referred to me after reaching trial before a judge, and in many cases the order or agreement to refer comes too late.

Solicitors are slow to take the initiative, and though it is not possible to generalise on many points it may be confidently stated that a strong tradition has grown up in the profession that a "good reference," when once the order is made, is a windfall for counsel and solicitors; it is long, lucrative and leisurely affair with great inducements to keep it alive, without fear of judicial censure.

The result of this tradition is that heavy and unmerited loss falls on almost every litigant, whether successful or not.

Connected with this great grievance is one of a more subtle nature. Many genuine disputes properly referred owing to the details of the claim, and involving in the aggregate £100 cannot be satisfactorily tried in the High Court at all on the present system.

The cost per hour is out of all proportion to the value of the items. It is a negation of business methods to spend even half an hour on an item valued at £2 or £3 and in a great many cases it is evident from an early period that the costs will probably fall upon the defendant and this has a great tendency to lengthen the case and penalise him. *This is hardly explained to him.*²⁶²

While upon this question of expense I should point out that a great deal of unnecessary time has been taken up in the past owing to the traditional attitude of the referee which can only be explained by his want of some more definite status. He has endeavoured to make up for his want of authority by a policy of conciliation and non-interference, especially when leaders of the Bar have appeared before him, and this attitude always tends to lengthen a case very considerably. I recollect one, which although it might well have been tried in about 10 days actually took 22 days, and the referee listened without comment to the speeches of counsel which occupied no less than 22 hours. The costs amounted to £5,000 and owing to an incomplete judgement the trial proved abortive.

Lastly it is clear that a referee is not a member of a trade; he for instance cannot be so expert at accounts as an accountant, or so familiar with building as a builder; and so he has to listen to contradictory evidence on many questions which would create no difficulty if he were a member of the particular trade or business. By comparison to a lay arbitrator this adds to expense.

As to these points I can best put my 2 first suggestions for improvement in the form of examples:

²⁶² Written in Newbolt's handwriting, the rest of the letter being typed. Author's italics for emphasis.

(1). In an action on a mortgage the defendant desired to take an account over 12 years. Accountants were to be called on both sides and the case was expected to last 2 or 3 days. On a summons before trial I suggested that only one accountant should be employed an independent man nominated by agreement or by me. This was accepted. I named an accountant and he was engaged for one day. Upon his report the defendant capitulated. No briefs were delivered.

The same accountant is now by consent in another case, investigating the accounts of sales of goods amounting to £12,000 the amount in dispute being only a small balance less, I should think, than the costs of a 2 day trial. There will be an immense saving of expense here.

(2). In an action for damages for bad workmanship in decorating a theatre it was intended to call expert witnesses on both sides. On a summons, I suggested that one independent expert should examine and report, and this was accepted and his report was received. It will very greatly reduce the time of the trial and the extra expense of witnesses and increase the probability of a satisfactory decision.

There is no compulsion, and counsel and solicitors seem well aware of the advantage of the parties of the introduction of these changes, which are made possible by the fact that, at any rate, after the order of reference, all the summonses come before the judge who is to try the case. He can always, if he likes, get seisin of the case, and save much of the expense incurred by leaving the solicitors to carry it on in the usual way.

There remains the fundamental difficulty of status and to improve this, and so obtain the best candidates for this responsible position, clothed as it is with all the powers of a High Court Judge I venture to suggest (1) that the Referee should take precedence of County Court judges (2) that all appeals from their decisions should go direct to the Court of Appeal leave being required to appeal from a decision on a summons;(3) that the recognised form of address to a Referee should be "My Lord" a title of respect allowed to a Commissioner of Assize and even to a junior barrister when he sits as a recorder or deputy recorder of a city like Bradford (4) that the salary and allowances should be increased and their pensions be at least on the same scale as those of County Court judges.

These suggestions hardly seem to require much argument but I may illustrate them by the following examples:

Some little time ago, in order to help an old friend who was ill I sat for 3 days as a Deputy County Court Judge and in my last case, in which no solicitor or counsel appeared I gave judgment for £5. In my first case here I gave judgment £17,700.

Counsel of the first rank sometimes appear on references and it is essential to the proper speedy and economical conduct of the judicial business,

whether heavy or light, that the referees should occupy a position which enables them not only to possess but to exercise all the powers of a judge in the most effective manner. Otherwise the old tradition will revive. I have endeavoured to compress my observations into the smallest possible compass, but in connection with this part of my report I cannot help wondering what a judge of the King's Bench Division would say if after adjourning a part heard case for the convenience of the plaintiff's leading and junior counsel, he found that neither of them appeared at the time arranged owing to engagements which they considered more important. In a Referee's Court such an incident carries no penalty, except for the plaintiff.

F. Newbolt.²⁶³

This report is important because in it Newbolt identifies the deficiencies in the referral process. This is critical to the concept of micro-caseflow management or the "Scheme" described here which has at its core the expeditious and economic resolution of disputes by conventional and unconventional means. It is also a key factor in the theory being the first real and direct evidence of a rudimentary form of caseflow management in this court. Here Newbolt identifies some problems and gives some examples of how he has case managed them.

First, personality of the referee is important particularly where the referee is of an equal professional standing to those appearing before him. Difficulty arose where the leaders of the Bar appeared before a referee whom the leaders considered had lesser standing. Referees continued to complain about their status for decades because of this. Whilst it is argued subsequently that subordination had advantage in terms of informality, it could be detrimental where a referee might have difficulty in encouraging a leader to settle.

Second, Newbolt warns about "cheap and speedy" arbitration and the dangers of injustice through irregular awards, but at the same time advocates cheapening the court procedure and recommending what are in effect elements of case management: expediting referrals from masters to referees; and use of independent experts. Significantly he identifies lawyers as a problem and suggests that a "good reference" militates against efficiency. In the same vein he attacks disproportionate cases where the legal costs are out of all proportion to value of the claim.²⁶⁴ Newbolt clearly understood

²⁶³ LCO 4/152 [HPIM 0560-0567]

²⁶⁴ Newbolt reported a case to the Lord Chancellor where the Plaintiff's costs exceeded the damages awarded. He gave the example of a case of five eggcups at three pence each and two pie dishes at one

and demonstrated his overriding commitment to cost effective case management which today is perceived as one of the key features of judicial case management.

Third, he perceived that there was a perceived disadvantage of appeals to the Divisional Court in 1930;²⁶⁵ they took time and they added further cost to the appellate procedure.

The figures given in the returns gave an average of 7 per cent of cases were appealed.²⁶⁶

But, not all referees agreed with Newbolt. For example, Hansell did not agree with the abolition of all appeals.²⁶⁷ From Newbolt's point of view it would have made things far more efficient and given the referees more credibility and status.

The passing of the Administration of Justice Act 1932 must be considered a triumph in terms of case management and recognition of the referees' role. The reason for this success was due to Lord Sankey, the Lord Chancellor, who wrote a memorandum to the Cabinet²⁶⁸ in September 1932 regarding a number of legal reforms "which experience has shown to be desirable."

Lord Sankey advised the cabinet:²⁶⁹

.....This reform has been duly considered by the Council of Judges of the Supreme Court, and its achievement calls for legislation since it is not within the competence of the Supreme Court Rule Committee.

It would appear that Hansell and Bosanquet approached the question of appeals differently from Newbolt.²⁷⁰ Bosanquet wrote to Lord Sankey in November 1932²⁷¹ saying:

OFFICIAL REFEREE'S COURT

No. 691

Royal Courts of Justice

November 2nd 1932.

My Dear Paterson,

I have been reading with interest the clause in the Bill which the Lord Chancellor is introducing dealing with appeals from Official Referees. I should

and sixpence. This case took as long as a case where the damages involved were £20,000. LCO4/152 [HPIM 0581]

²⁶⁵ LCO 4/152 [HPIM 0524]

²⁶⁶ see Appendix. Table of Appeals. Between 1928-31 there were 31 appeals which occupied the Divisional Court for 51 days, each appeal taking an average of 8 hours. 5 were further appealed to the Court of Appeal taking another 4 days in court. LCO 4/152 [HPIM 0524-0543]

²⁶⁷ LCO4/152 [HPIM 0581-0582]

²⁶⁸ LCO 2/1710. [HPIM 0535] Lord Chancellor to Cabinet.

²⁶⁹ LCO 2/1710 above.

²⁷⁰ Senior Official Referee 1927-1931.

²⁷¹ LCO 2/1710. [HPIM 0540] Sir Ronald Bosanquet K.C. (Senior O.R. 1931-54) Letter to Lord Chancellor, 2 November 1932.

much like to have an opportunity of putting my views-which incidentally were those of Hansell him (*sic*). Which of his Secretaries is concerned with this hand of the business? The view which we both hold is that while we entirely agree that the appeal should go straight to the Court of Appeal, we think that having regard to the complexity of the matters which come before us the procedure by Special Case would be cumbersome, and in many cases quite unworkable. Of course Hansel's view is deserving of much more respect than mine. I know that it is in conflict with Newbolts-but then the latter would like to abolish appeals from Official Referees altogether-and has stated to me that in his view the proposed method would in effect do so!

Yours ever

S.R.C. Bosanquet.

However Newbolt seems to have won the day by sending a Memorandum to Lord Sankey:²⁷²

Administration of Justice Act, 1932

MEMORANDUM

What further Rules of Court are necessary.

In my opinion it would be to the advantage of suitors, and for necessary alterations in the Rules of Court to be made this term. If this is not generally acceptable, I suggest that the order should be made direct Jan. 1st, 1933, as the day, and the alterations, which seem slight and not controversial could be considered and settled in a brief period, this term.

The points requiring consideration are-

- (1) Cases sent to the Referee for enquiry and report, under Section 88 of the principal Act;²⁷³
- (2) Interlocutory appeals on questions of law;
- (3) Trial of any question or issue of fact under Section 89 of the principal Act, which implies that the action remains in the jurisdiction of the Judge making the order of reference.

As to (1) the practice in this respect has become almost obsolete. I cannot remember having had such a case in 13 years, and I am informed by the Rota

²⁷² LCO 2/1734 *Appeals from referees: question of altering rules consequent on the Administration of Justice Act, 1932 (s.1); Rules of the Supreme Court (No.4, 1932; Appeals from Official Referee's Order, 1932* [HPIM 0839] Memorandum from Sir Francis Newbolt QC to Lord Chancellor, November 1932.

²⁷³ LCO 2/1734 [HPIM 0839-0840] Newbolt had certainly not had any such case in 15 years and were to all intents defunct.

Clerk that only one such case has come into the office, certainly during the last 3 or 4 years.

Such a report when adopted, wholly or partially, becomes a judgement automatically and the appeal, if any, is an appeal against the decision of the Judge.

(2) Almost every interlocutory order is discretionary, and without appeal, but in a rare case a point of law might be decided. But I have formed the opinion which is shared by all those whom I have consulted that the Act forbids interlocutory appeals to the Court of Appeal or otherwise.

(3) Trials by Official Referees merely of issues of fact, except the estimation of damages are now unknown. Apart from damages, it is the invariable practice of the Judges to refer the whole cause or matter.

....

(Sgd) Francis Newbolt
Senior Official Referee
19.11.32.²⁷⁴

Newbolt's comment that High Court judges had adopted the practice of sending the *whole cause or matter* to a referee is significant. It goes beyond what Lord Selbourne said in the House of Lords in February 1873 that referrals would be confined to matters of fact and account.

One of the advantages of not having a jury was that the judge could order a short adjournment for the parties to consider settlement. The parties frequently requested trials on liability only without any reference to damages.²⁷⁵

Newbolt noted that the draft new rules recognised the referees' position by extending Rule 19A of the *Rules of the Supreme Court*.²⁷⁶ This gave a right to appeal a decision of a referee on a point of law to the Court of Appeal, instead of to the Divisional Court of King's Bench.

On the 13 December 1932 Albert Napier²⁷⁷ sent the Lord Chief Justice, Lord Hanworth²⁷⁸ an advance copy of the new procedure. Hanworth endorsed the letter:

Yes. I have gone through them and agree

²⁷⁴ LCO 2/1734 HPIM [0839-0841] Memorandum Newbolt to Lord Chancellor

²⁷⁵ LCO 2/1734 [HPIM 0840] Memorandum Newbolt to Lord Chancellor.

²⁷⁶ LCO 2/1734 [HPIM 0839-HPIM 0842-0843] Memorandum: Supreme Court Rule Committee on *Rules of the Supreme Court (No.4)*. 1932. Rule 19A applied to appeals from the Railway and Coal Commission and the Railway Rates Tribunal.

²⁷⁷ Napier was assistant secretary in the Lord Chancellor's office and Deputy Clerk of the Crown in Chancery from 1919 to 1944 when he became Permanent Secretary to the Lord Chancellor and Clerk of the Crown in Chancery. He has been described as a "brake not an accelerator".

²⁷⁸ LCO 2/1734 [HPIM 0845] Letter from Lord Chancellor to the Master of the Rolls, Ernest Murray Pollock, Lord Hanworth. (1923-1935). Rules effective as at 1 January 1933.

Appeals direct to the Court of Appeal was perhaps the high water mark of Newbolt's efforts to raise the standing of the referees.

The July 1920 report was the catalyst for Newbolt's "Scheme" and whether officially supported or not it became the foundation for practice in the referees' court. The November 1932 Memorandum and Newbolt's views as to appeals gave the court a greater standing. Lord Sankey's action brought the referees' court into line with the other Queen's Bench courts so that their judgments were not capable of review by High Court Queen's Bench judges. The significance of the measure meant in effect that the judgment of the referee became a judgment of the High Court.²⁸⁰

Newbolt's "Scheme" was the prototype of case management and informal referee resolution and provides the basis for the exposition of the theory that case management and informal referee resolution created a more efficient court. We further examine this "Scheme" by a literature review and qualitative analysis of contemporaneous archival material and Newbolt's publications. From this review the following analysis of the principal features of rudimentary caseflow management emerge.

3.8 Discussion and analysis of elements of rudimentary caseflow management

3.8.1. Early procedural evaluation and rudimentary informal referee resolution

Newbolt's article in the Law Quarterly Review²⁸¹ *Expedition and Economy in Litigation* described various case-types: including building and dilapidations cases, matters of taking account, local examination of building, machinery and farms and other subject matters. His central critique was aimed at cost inefficiency and delay. Newbolt wrote that defendants incurred unnecessarily burdensome costs in preliminary proceedings which were not "always deserved."²⁸² This loss deterred parties from litigation.

As Newbolt said:

The interlocutory proceedings before reference may be so extravagant and dilatory as to defeat justice.

²⁷⁹ LCO 2/1734 [HPIM 0846]

²⁸⁰ LCO 2/1710. [HPIM 0532] Note on the Administration of Justice Bill by Lord Chancellor's Assistant Secretary Napier.

²⁸¹ n.2 p. 434.

²⁸² n.2 p. 435

Newbolt significantly developed a practice at First Summons for Directions stage of not only giving directions for the further conduct of the case, but also made it his practice to discuss the merits, issues and value of the claim with the solicitors who appeared before him. In the course of this he took the opportunity of considering how time and cost could be saved. In Newbolt's words he had 'friendly business discussions' during the interlocutory process with those appearing before him. It was this business-like approach and his rapport with solicitors that facilitated his "Scheme."

Thus he could confidently report in his last letter to Birkenhead as Lord Chancellor:²⁸³

13th Feb 1922

My dear Lord Chancellor,

I have from time to time sent in reports of the work in my Court, beyond the official returns, showing how I am able to prevent delay, simplify procedure and reduce expense. Now at the suggestion of two of the judges, I wish to draw attention specially to a case in which I delivered judgment yesterday as it is a striking example of what I am fighting against.

The judgment is in writing, and if you so desire, I will send you a copy.

A dispute arose between a builder and a building owner and a writ was issued in October 1920: the case only came before me for trial.

The interlocutory proceedings during the previous 16 months was open to the most severe criticism and when I reserved judgment after a three day trial I ascertained by courtesy of the solicitors that the plaintiff's total costs were estimated at £497, including about £125 for counsel's fees and the defendant's costs at about £400. Total about £900. The plaintiff recovered £122, ordered by previous payment set off to £27.

I gave judgment for £27.

If the case had come before me on the delivery of the Statement of Claim indorsed on the writ it could have been disposed of in a few weeks at small cost. On a hint from one of the judges, I only desire to add that in my scheme for cheapening and expediting litigation nothing is done without consent. It is by friendly business discussions over the table that the simplification is offered.

²⁸³ LCO 4/152 [HPIM 0593]

In no case has any decision of mine in Chambers been overruled and the only appeal against a decision of the court was emphatically dismissed today by the Divisional Court.

I respectfully suggest that after 2 years trial this is a satisfactory answer to any enquiry.

Yours truly,
Francis Newbolt

The Rt Hon.
The Lord Chancellor

This letter is significant first, because it confirms Newbolt's "Scheme" in particular his "friendly business discussions in Chambers" undertaken with the support of the parties. Second, because the decisions he reached as a result and his practice was never appealed or overruled. It is quite revolutionary in its disclosure, as is the fact that another judge has suggested that Newbolt disclose his "friendly business discussions". Birkenhead clearly felt some unease about this because of the judge's function. The last reply from Birkenhead's Permanent Secretary to Newbolt is therefore invaluable in this debate²⁸⁴:

21 February 1922

Dear Frank,

The Lord Chancellor asks me to reply to your letter of the 13th February.

He is very glad to read it. He had always anticipated from his long acquaintance with you that you would dispense justice with expedition and equity and that in so doing you would have special regard to the interests and the pockets of the litigant.

There is only one point upon which he has felt some uneasiness. He has now sat as a judge himself for three years and his experience during that time has confirmed the opinions which he formed at the bar as to the judicial conduct of litigation. It is no doubt desirable that the advantages to be obtained by settling instead of fighting should be present to the mind of the lay client and of his professional advisers. But the Chancellor himself has seen so much of the dangers which arise from any undue pressure towards a settlement exerted from the Bench that he himself is most careful ever to avoid such action. There are cases which are better fought out and there are clients who desire to fight even

²⁸⁴ LCO 4/152 [HPIM 0594-0595]

more than they desire to win. And there are others who, though their principal object is victory, are better content with defeat than an inglorious peace. So strongly does the Chancellor hold these views that he always deems it desirable to impress them upon all who administer justice, but he thinks that they are specially to be borne in mind by anyone who, like yourself, is eager for justice and justly impatient of the waste of public time.

Yours sincerely,

(Sgd). Claude Schuster

Sir Francis Newbolt K.C.

Birkenhead's unease about settlement discussions goes to the heart of a dilemma here: on the one hand, the referees wanted to be like High Court judges which Newbolt felt they were "all but in name." On the other hand, Newbolt wanted to dispense justice informally because this was the only way he could expedite his list. Newbolt's approach might be reconciled to the Commissioners objective of a process being "capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried."

Whilst Birkenhead's letter of reply was ambiguous in that Birkenhead thought that Newbolt should have special regard to "the interests and the pockets of the litigants," he also felt some "uneasiness" in that there were dangers in judges "exerting any undue pressure towards a settlement." On the other hand, he was alive to "the waste of public time." Birkenhead could not sanction the "Scheme" because of his unease in the light of his own experience in sitting as a judge and anxiety over "undue pressure" from the bench. On the other hand, Birkenhead and Schuster undoubtedly recognised Newbolt's initiative and to an extent whilst the letter is cautious it is also complimentary and encouraging. It is fortunate that Newbolt's early experimentation in this field coincided with Birkenhead's tenure and that Birkenhead did not discourage Newbolt's reports, his experimentation, or the "Scheme."

What is significant is that in the absence of any other contemporaneous evidence of fact this may be considered as the first instance of alternative dispute resolution in England in a court setting. Newbolt was not deterred and there is no evidence to suggest he altered his practice, because some time after July 1921 he wrote again to Birkenhead intimating support from the profession:²⁸⁵

²⁸⁵ LCO 4/152 [HPIM 0582] The letter is undated, but appears on the file after July 1921 correspondence.

I have devised means of enabling the parties to have their disputes decided cheaply and rapidly and my efforts in this direction have been widely approved by the profession....

This suggests that there existed a concurrent consensual dispute process possibly more like early neutral evaluation or mediation than arbitration. However Newbolt did not find it easy to use this expedient in other types of cases such as disputes over dilapidations and damage to property items.²⁸⁶

A further extract from Newbolt's article²⁸⁷ gives a good example of the benefit of Newbolt's approach here:

The Defendant who often has good reason to complain of some overcharge, of defective work, swears a vague affidavit, and obtains leave to defend as to part, or all, of the claim. But he may have, in fact, no case. If a few days after an order on the summons before the Master the parties met before the Referee and discussed the position such a miscarriage of justice as appears in the cases described would be impossible. The main source of avoidable waste of money is the occupation of time in Court which a little thought and discussion in Chambers would save, and does save. In matters of account, in kindred cases, much money has been thrown away in the past by discussing in open court matters of pure arithmetic, or the contents of business books which turn out not to be in dispute, or not material to the issue, or fatal to one parties contention. Many other examples might be given. In one case evidence was taken before and also at the trial on both sides to prove the market price of goods at a foreign port. *If a preliminary discussion had taken place*²⁸⁸ none of this evidence would have been gone into as it was not relevant to any issue on the pleadings. Another instance will strikingly illustrate the point. A mortgagor claimed an account of matters extending over many years: the case was expected to last for a fortnight. After *an informal discussion in Chambers*²⁸⁹ the parties agreed that an independent accountant should examine the books before trial, as a witness for both sides, and report on the points in difference: so that the issue between the parties should be defined and tried. He reported that having explained the figures to both the Plaintiff and the Defendant there were no points in difference and there was nothing to try. *This is not arbitration or conciliation or concession, but an intelligent use of a Court of justice by business men.*²⁹⁰ They spent perhaps £50 or less in arriving at a result which would in the ordinary course have cost ten times that sum, and would have worried them for a year.

²⁸⁶ Newbolt. Further report to Lord Chancellor, June 1921.

²⁸⁷ n.2 pp. 438-439

²⁸⁸ Author's italics.

²⁸⁹ Author's italics.

²⁹⁰ Author's italics for emphasis.

What is crucial here are Newbolt's explicit references to "preliminary discussion", "informal discussion in Chambers", and "use of a Court of justice by business men". The fact that this article was published a year or so after his correspondence with the Lord Chancellor reveals his commitment to an alternative resolution process and exhibits a certain confidence in case management.

As proof that this "Scheme" worked Newbolt's article included the following figures for the recovery of damages in the immediate post first war period which appear in the following table:

Table. T 3.1 Amounts recovered

Year	Cases	Amount Recovered
1920	100	£76,536
1921	150	£81,482
1922	171	£171,079

*Source; Expedition and Economy in Litigation*²⁹¹

According to Newbolt less than a quarter percent of the cases were subject to any appeal. What is interesting about his figures is that there appears a 100 per cent increase in recovery at the time Newbolt confirms that the "Scheme" was in operation. Newbolt sent a copy of this article to Lord Haldane,²⁹² Lord Cave, Lord Justice Akin,²⁹³ and Sir Wilkes Chitty²⁹⁴.

Lord Haldane was more appreciative than Lord Cave as Schuster on behalf of Haldane wrote:

9th May 1924.

Dear Frank,

The Lord Chancellor has asked me to thank you for your letter of the 2nd May and for the copy of the Law Quarterly Review which accompanied it. He has read your article with much interest and has considerable sympathy with many of the suggestions you make.

He will be very glad to discuss any proposals which may be made with the Solicitor General in due course.

Yours sincerely

(sgd) Claude Schuster

Sir Francis Newbolt, K.C.

²⁹¹ n.2 p. 439

²⁹² LCO 4/152 [HPIM 0619] Newbolt to Napier to undated.

²⁹³ Newbolt's book: *Out of Court* was dedicated "by his friend the author" to Lord Justice Akin in 1925.

²⁹⁴ Newbolt's former Head of Chambers.

Had Lord Haldane's party remained in government longer then Newbolt might have received more support.

However, following Newbolt's retirement in 1936 this informal process was continued as a matter of referee practice by his successors. This is demonstrated by a number of matrimonial property disputes which were referred to the referees after the war.²⁹⁵ One such example was *Johnson v Johnson*.²⁹⁶ Here the costs were grossly disproportionate. Damages were assessed for the plaintiff at £1 on the claim and for the defendant at £6 10 shillings on the counterclaim with costs on the County Court Scale. On an adjourned application the plaintiff was ordered to pay the defendant all the defendant's costs of £100. These terms were agreed between counsel at an adjourned hearing before the referee in chambers to avoid further cost.

3.8.2. Judicial intervention promoting expedition and economy

The crux of interlocutory management practised by referees in the 1920s as advocated by Newbolt centred on the referee having control of that process. It is argued here that Newbolt's "Scheme" resulted in more expeditious trials, if not earlier settlement, which promoted his "Scheme" of a continuous judicially managed process whether that was under the *Rules of the Supreme Court* or *ad hoc* or informally managed consensual process. We illustrate such judicial interventionism by reference to the use of quantum experts by Newbolt's successor Eastham in Chapter 4.

3.8.3. Experts

(a) Use of single joint expert/court expert

Presaging the civil justice reforms of the 1990s by more than 70 years Newbolt pioneered the use of court experts. He saved time and costs by the proper and necessary employment of experts. In his report of 5 July 1920²⁹⁷ Newbolt tells Lord Birkenhead about his experiments with expert evidence citing the accountancy expert example.

What is interesting here is that Newbolt was experimenting, not only with a case management process at least 14 years before the *Rules of the Supreme Court* were

²⁹⁵ These are included in the notebooks J.114/1-8 and refer to assessment of value of matrimonial property, and disputes over ownership. Evidence from the second comparative period 1947-1070 is contained in Chapter 4

²⁹⁶ J114/1 21 October 1946. [HPIM 1746]

²⁹⁷ LCO 4/152 [HPIM 0565] p.5.

augmented by Order 37A,²⁹⁸ but he was directly intervening in the action in order to reduce cost and delay and procure by these means a quicker solution and settlement. This is therefore a good example of judicial management and “interventionism.”

There is no evidence that Newbolt’s practice encouraged the parties to incur further costs of instructing their own party experts. The court expert was the only expert engaged.

The important point here is that the initiative came from the judge, not the parties; the judge taking control away from the lawyers to actively caseflow manage the proceedings more economically.

On the same theme, just over 10 years later, Newbolt wrote to the editor of *The Times* about methods of saving expense:²⁹⁹

...Since the war there has naturally been a great stream of cases brought by landlords against tenants about dilapidations, and by builders, contractors, and decorators, and others against building-owners about the price of work done, and in all these cases at least the parties are very anxious to avoid unnecessary expense, and eagerly fall in with the idea that only one expert witness should be employed. He is not an assessor or arbitrator, but a witness. The saving of money, especially to defendants, is surprising.

The plan has a double advantage, as the independent expert gives both parties a copy of his proof long before the expensive preparation for the trial, and from its perusal they can predict the result of a hearing in Court, apart from questions of law, so accurately that in many cases no formal trial takes place at all.If only one witness is employed he is single minded, and paid to be truthful and helpful, and not combative. He is chosen by the parties, by some professional institution, or by the Court, and can naturally be cross-examined by both sides, though this has very rarely happened. The same procedure can be pursued in many other cases, particularly those involving accounts, inspection of books, vouchers, &c. A report by one independent accountant of the contents of these, before any proceedings are taken beyond the writ, saves a startling percentage of the costs of the action.

There are many other ways of saving expense, which, when offered, are eagerly agreed to by litigants, but as they are not compulsory or according to old routine they are not so often suggested as they might be. Space does not permit me to

²⁹⁸ Under *Rules of the Supreme Court* (No: 2) 1934 Order 37A each party had the right to call an expert or experts with leave with regard to the “issue for the expert”. This enabled the Court in non-jury actions to appoint an independent Court expert to “enquire and report upon any question of fact or opinion not involving questions of law or construction”,

²⁹⁹ *The Times*. 4 September 1930. p.11. Issue 45609. col. F.

suggest how the apparent difficulty about fixing trials can be met, or *how the suggested second summons for directions before the Judge would be most beneficial*,³⁰⁰ or how arbitration, with all its convenience and finality can be obtained in the Law Courts for the ordinary Court fees.

Yours truly,
FRANCIS NEWBOLT

Not only does this letter advocate the utility of the single joint expert but it has wider implications for Newbolt's "Scheme" and an activist approach. It may well be that because of Newbolt's practice in this sphere the rules were changed in 1934 to empower the court to appoint such experts.³⁰¹ The other important procedural innovation and case management function we would recognise today is the use of that "second summons for directions." This translates today to a pre-trial hearing or further case management conference. It is also further evidence of a tighter continuous judicial control: another facet of modern caseload management.

In *Expedition and Economy in Litigation*³⁰² Newbolt advocated the use of experts to deal with particular matters which could save time in the interlocutory process:

What the commercially minded Defendant, willing to pay his debts, wishes to do is to show why and in what respects he objects to paying the whole of the claim, and this he does by giving particulars of the items which he says are not chargeable, or are overcharged. Every case must be treated on its special circumstances and not upon any rule which is not a Rule of Court, but there are some large classes of cases with common features: the greatest saving has been effected by the introduction of the independent expert witness and the attendant reduction of interlocutory proceedings which are rendered unnecessary, and of the expensive hours of trial in Court.

(b) Expert determination and investigators of fact

Newbolt's "Scheme" appears to have encompassed a number of experiments with experts as investigators. One example he reported to Birkenhead in November 1921 was in the form of a letter from a member of the Bar Mr S. A. Merlin. Mr Merlin told Newbolt that his initiative in the case had been:

One of the most practical means of reform of our jurisprudence as shown for years, as I know how costly were these actions in the past.

³⁰⁰ Author's italics for emphasis.

³⁰¹ RSC (No. 2), 1934. applied to non-jury cases in which any question for an expert witness was involved. Maugham, L.J. regretted such witness had not been appointed in *Fishenden v Higgs and Hill Ltd.* (1935), 153 LT 128 CA Apart from this statutory power, the court could appoint an expert at Common Law under its inherent power *Kennard v Aslam* (1894) 10 TLR. 213; *Henson v Ashby* [1896] 2 Ch. 1. p. 26; *Coles v Home and Colonial Stores Ltd* [1904] AC 179, p. 192 and *Badische v Lewisham* (1883) 24 Ch Div. 156.

³⁰² n.2 p.427.

In the case, Newbolt ordered the surveyor/expert to view the premises. The expert took his instructions from Newbolt not from the parties. The Plaintiff claimed £349 damages. £300 was paid into Court, but the Surveyor opined that the claim was worth £185. This produced an expeditious settlement, saving costs without the need for a trial.³⁰³ This innovation was groundbreaking because Newbolt himself selected and instructed the expert.

In *Expedition and Economy in Litigation*³⁰⁴ Newbolt gives two further examples of the use of experts which are contradictory.

Number 13 - Writ issued March 1921, action eventually referred. An accountant nominated in 1922 to make a report and in January 1923 after a two day trial Plaintiff recovered about £140. 22 months from issue of Writ to trial. Costs exceeded £400, accountants were not independent and their appointment was made before the case was referred.

Number 14 Dilapidations case - Defendant put in a substantial defence and paid £300 into Court less than half the amount of the claim. After several days hearing the Plaintiff accepted the Defendant's offer of £500 including costs. The Plaintiff's costs were taxed at £577. The assistance of an independent witness was refused, had it been accepted in all probability it would have saved the Defendant a sum not much less than his whole legal liability under the covenant.

Example 13 suggests that such partisan experts did not reduce delay or costs whereas, in example 14, the court appointed expert may have facilitated considerable savings. The important point here is how they may be managed by the judge, not the parties. Newbolt seemed very aware of this. Whilst the lawyers undoubtedly helped facilitate some settlements, in others "enjoying a good reference" was another matter. In those cases caseflow management was a means of making the process cost effective.

(c) Experts and settlement

Newbolt's objective, as explained in his article, was focussed on questions of damages and costs:

that in a *discussion in chambers*³⁰⁵ on date and mode of trial both parties agree that one expert engaged and paid by both sides is preferable, and for the following secondary reason, even more than for the most obvious one. The great error in the ordinary honest Defendant's course is that he fails to pay enough into Court. So in all cases immediately under consideration the Defendant must pay in something: the punishment is terrific if he does not, as he is entirely at the mercy of the Plaintiff, and in general has to pay most, or all of the costs of both sides in any event.

³⁰³ LCO 4/152. [HPIM 0586-0587]

³⁰⁴ n.2.

³⁰⁵ Author's italics.

The dilemma was how the defendant was to estimate the measure of payment in. To pay in too little was useless. He had to act on the advice of his expert. According to Newbolt, such experts calculated the figures upon rash assumptions assuming their evidence would be accepted on every single point. Newbolt gave warning about this:

When he comes into Court he hears the Plaintiff's experts swear to a claim not only larger, but in some cases twice, three times, five times or even ten times as large. A recent decision was for six times the Defendant's figure, although it only amounted to one quarter of the Plaintiff's figure. In another the estimate of a reliable expert was 10% of that of his opponent.

Understanding expert evidence was one of the key problems for referees who might have had little knowledge of the technical issues before them, hence Newbolt's attention to the proper use of experts in his court:

An independent witness surveys the subject matter unbiased and estimates that the amount due before any of the great expense of the trial is incurred, with any necessary reservations, where questions of law may arise, and gives proof to both sides, and receives half his fee from each, both halves being made costs in the cause. He may be cross examined by both parties if either calls him at the trial, which he attends only if required: and both parties retain the right to call any amount of evidence to contradict him, a right which in practice, however, is not often exercised. The advantage to both parties can easily be perceived, but to the Defendant it cannot be over-estimated. He knows in time what to pay into Court, and in general is able to agree the facts with the Plaintiff, and to narrow the issue to something which occupies the Court for perhaps one fifth of what used to be considered the normal time. The layman who has had this properly explained to him, and prefers the old method, and what is called a fight to a finish regardless of costs, can hardly be said to exist.³⁰⁶

We have already seen the utility of judicial intervention in the appointment of court experts, but in this context what is particularly interesting here is the linkage in Newbolt's analysis of the expert's role and settlement. Newbolt saw the expert as playing a leading role in estimating or calculating the damages facilitating early settlement. The expert was in court to assist the court, not to advocate the parties' case. More importantly Newbolt refers to saving "perhaps one fifth of what used to be considered the normal time." This supports the hypothesis as to efficiency in that possibly 80 per cent of the time could be saved in court and also addresses research questions at paragraph 1.6 (d) and (e).

3.9 Application of proportionality on costs

In his critique *Expedition and Economy in Litigation*³⁰⁷ Newbolt criticised the waste of time and money in the traditional adversarial procedural system. Whilst not directly advocating his scheme of a concurrent consensual referee resolution process, he

³⁰⁶ n.2 p.437

³⁰⁷ n.2 p.427.

acknowledged the fundamental principle that allowed “every citizen to make or resist a claim in the courts with perfect freedom.” He then considered the citizen’s complaint:

No one complains that his case is impatiently tried, or decided against him by a dishonest, biased or incompetent tribunal: and yet every litigant complains.

Reading the article it is clear that his experience as a referee led him to these views. He focused upon delay and expense as being the subject of very wide complaints. As he wrote:

They overlap to a certain extent, as delay causes expense and actual loss of money in more ways than one: unnecessary proceedings not only cause expense, but also delay. In all discussions between those who desire to see a serious grievance mitigated or removed a difficulty always arises because the actual relevant facts are not ascertained or agreed. I shall therefore try to avoid this, by first inviting perusal of the briefest précis of a small number of recent cases, referring to them afterwards only by their numbers. The points to bear in mind are (a) time from writ to judgement; (b) amount of expenses of litigation in comparison with money obtained or in dispute; (c) payment into Court; (d) the assumed desire of one or both litigants for a fight to the finish regardless of expense; (e) the urgent necessity especially at the present time for encouraging litigation and not starving it, or diverting it towards the quicksands of arbitration.³⁰⁸

From the same article Newbolt gives illustrations of disproportionate costs and some practical examples “so extravagant and dilatory as to defeat justice.”³⁰⁹

The first was that of a builder who issued proceedings by writ in October 1920 against the building owner for the balance of account. After interlocutory proceedings lasting 16 months the case was referred and judgment was given for the plaintiff in the sum of £27. The trial lasted three days and the plaintiff’s costs including £125 for counsel amounted to £490. The defendant’s costs were approximately £410. The Defence was dated nine months after the Statement of Claim. £900 was spent pursuing a £27 claim. The costs were 33 times the amount of claim.³¹⁰

His second illustration was a claim for damages for dilapidations worth £100. £10 was paid into court. It took almost three years to come to trial. The referee gave time to settle and negotiate without result. Judgment was given for the plaintiff for £16. Costs were awarded on the County Court Scale.

Another illustration (Number 9) concerned a schedule of dilapidations and a claim for damages for £162. Proceedings were issued in January 1922. The defendant refused consent to a referral and wanted the High Court to decide on a matter of title. He lost

³⁰⁸ n.2 p.427

³⁰⁹ n.2 p.435

³¹⁰ Interestingly in 2005 the Court of Appeal dealt with a similar situation in the *Burchell* case where legal costs were 37 times the damages awarded.

that preliminary issue in January 1923 and a reference for an assessment of damages was taken in April 1923. At trial, in June 1923, the value of items was reduced from £95 to £81. The plaintiff's taxed costs were £129; the defendant paid that and the costs of the reference. Newbolt commented that the liability of £81 was increased to about five times that amount by the contest which lasted for 18 months; without the help of an independent expert witness the defendant's losses would have been much greater.

To be a success Newbolt's "Scheme" required continual management of the process by the judge and avoidance of such examples as this. His publications and reports suggest that Newbolt would have enquired not only into merits, but also into costs in proportion to the value of the case.

In Eastham's report to Lord Jowitt on 28 January 1947³¹¹ and in an appendix to that he cited the case of an ex-London Sheriff who sued his architect and his quantity surveyors for negligence claiming £35,000 in respect of an extension and alteration of his country house. The trial lasted 22 days. Four King's Counsel were instructed with one brief marked at 350 guineas. The referee gave judgment for the plaintiff in the sum of £4,214 with costs. The taxed costs in this case were over £3,500.

Eastham's notebooks have numerous entries dealing with costs. Eastham was innovative in this area; his orders being more in keeping with the second millennium than the mid-twentieth century. In *Harris v Mac Rex Foods Limited*,³¹² for example, a claim for defective works to a boiler, judgment was given for the plaintiff who was not fully paid and an order was made against the defendant for payment out. Both solicitors agreed that the judge could make a "fractional order" on costs on a four-fifths basis.³¹³ In *Plant Machinery v HP Thomas Limited* an order was made for payment of monies out of £200 to plaintiff's solicitors without further authority and the trial was adjourned until May 1947. Each party was ordered to pay half the court fees of the application for adjournment.³¹⁴

In *Zenith Skin Trading Co Ltd v Frankel*³¹⁵ there is a good example of a modern costs order such as more lately seen under *Civil Procedure Rules*. Here the plaintiff's costs of

³¹¹ Lord Chancellor 1945-51. LCO 4/153 [HPIM 0797-0800] *Appendix to Report of Sir T Eastham to Lord Jowitt, Lord Chancellor*. 28 January 1947.

³¹² J114/2 p. 92 [HPIM 1787-1789]

³¹³ Considering the year 1948 this is a very modern type of costs award where costs are not awarded as to each party's case but one order is made taking into account the other side's result. This saved time and cost in taxing two bills one for the claim and another for the counter claim.

³¹⁴ J. 114/2 [HPIM 1790]

³¹⁵ J.114/4 [CIMG 0049] further described below in paragraph 4.3.4.

the first day of trial were borne 70 per cent by the defendant, and 30 per cent by the plaintiff. The defendant paid all subsequent costs to the plaintiff.

It seems the referees were ahead of their times because there is further evidence of a more modern type of costs order, for example, an entry on 31 January 1949 for the adjourned hearing of *Jayes Limited v Home Foods Limited*.³¹⁶ The Order entered provided that the defendants be granted two-thirds of the costs of the hearing. What is demonstrated here is the referee's modern approach to costs, what we call today "proportionality," and its application as a basis for the award of costs.

3.10 Invention of special pleadings

In *Expedition and Economy in Litigation*³¹⁷ Newbolt criticised formal pleadings considering that a mere formal denial by way of defence was totally unnecessary and burdensome. It was merely a "dilatatory step in the proceedings".

In his eleventh example³¹⁸ concerning a claim for dilapidations the parties nominated a surveyor as a joint expert. There were no pleadings, no summonses or formal appointment "disappeared from the list." Newbolt referred to this case as a "striking example of a new method of economy." Newbolt had dispensed with pleadings and ordered Statements of Case being a summary of the claim with the relevant documentary evidence. In other cases he often found that the defendants demanded particulars which had already been received before the action, but were not given to the solicitor. He also found that defendants often put in defences alleging work not done, excessive charges and bad workmanship, without adequate or any particulars. Newbolt considered that these defendants acted unthinkingly without regard to the fact that they would have to pay for these further proceedings. Newbolt was critical of those who spent time "making costs" and went to trial "rashly" as opposed to those who employed experts properly. Such persons were excluded so far as he was able.³¹⁹

3.11 Preliminary issues and questions for the court

In his article³²⁰ Newbolt considered the advantages of the new Order 30 RSC³²¹ regarding the summons for directions procedure. He opposed this for referees because

³¹⁶ J114/6 pp 67-105. [FR 072-074]

³¹⁷ n.2 p.430 and pp. 435-436.

³¹⁸ n.2 p..427.

³¹⁹ n.2 pp.435-437.

³²⁰ n.2 p..437.

of the advantage of dealing with directions early. He saw the Summons for Directions as arbitrators saw preliminary meetings: a business meeting to discuss the agenda for resolving the dispute. There was no point in leaving issues to be defined too late if it could be avoided, as he wrote:

Without venturing upon any general criticism of legal procedure, it may safely be said that there is no greater check on wasteful expenditure than the arrangement by which the Trial Judge takes his own summonses, especially if he makes notes of them upon the file.....*the mere discussions across a table which costs nothing in comparison with the costs per minute in Court,*³²² discloses what issue it is exactly that the parties wish to try, and eliminates the very source of the litigants grievances. Where the case is referred too late the mischief is already half done, but in time this will remedy itself, and all cases which must eventually be referred will be referred on the issue of the Writ, or at any rate on the hearing of a summons under Order 14.³²³

Again the focus here is upon informal discussions at the summons hearings and what they could achieve. This would be lost by adherence to Order 30. Newbolt reiterates his views contained in his letter dated 15 February 1932 to Lord Sankey.³²⁴ He confirms his informal resolution practice and indicates how important it is to caseload manage the process so that issues between the parties are identified early to save court time and party costs. The former procedure had been to issue a Summons for Directions before pleadings were exchanged.³²⁵ The new Order 30 (ignored by the referees in practice) provided that such summons could only be issued after service of the Reply.

3.12. Geographic and more economic location for the parties

One of the novelties of the Judicature Acts was that the referee was empowered to sit at a convenient location. It was not unusual for referees to sit elsewhere. In fact in 1925 Newbolt sat in Manchester.³²⁶

The following correspondence confirms that Newbolt also sat in Lancaster. The endorsement by Lord Cave rejected Newbolt's request for a meeting.

³²¹ RSC 1883 as amended by RSC (No.1), 1933. Under the 1883 rules the taking out of the summons for directions was optional; under the 1933 amendment it had to be taken out within 7 days of close of pleadings.

³²² Author's italics for emphasis.

³²³ n.2 pp.437-438

³²⁴ LCO 4/152 [HPIM 0592] Sankey was appointed Lord Chancellor from the High Court Bench.

³²⁵ RSC amendments to RSC 1875 (May and August 1897, and July 1902)

³²⁶ LCO 4/152. Letter to Lord Cave, 12 March 1925.

Much more complicated
impossible now³²⁷

12 March 1925

Confidential

OFFICIAL REFEREES' COURT

No. 195

Royal Courts of Justice

W.C. 2

Dear Lord Chancellor,

Augustine Sherman is reported as having stated at Assizes that there ought to be an Official Referee for Lancashire as many cases arise there suitable for such a Court as witnesses cannot conveniently travel to London. This is so misleading that, if allowed, I should be glad to explain the position to you privately, and invoke your assistance.

I should be able to explain to you, and cannot do so in a letter, why cases are "specially referred", so as to avoid the Rota.

Why References mistakenly go first to Assizes with enormous loss to the litigants is easily explained: but to begin at the beginning, Lancashire witnesses need not come to London to attend the Court of an Official Referee. Except, very rarely, by consent, they never do so, as the Referees travel to Liverpool and Manchester when necessary. I have myself been to the latter even to take the evidence of a witness going abroad.

Eastham records that he sat at the Town Halls in Leeds³²⁸ and Henley.³²⁹ He also sat in the Magistrates Court at Tunbridge Wells.³³⁰ Another example in the post war decade is a note by John Trapnell K.C.³³¹ in *Agnew v Maycock*³³² who notes that proceedings took place in the Town Hall in Leeds. Also in *Plaehet v Stormond Engineering Corporation Limited* Sir Derek Walker Smith agreed with the referee that there would be no formal disposition, and that evidence could be taken at the plaintiff's premises.³³³

³²⁷ LCO 4/152 [HPIM 0614 gamma enhanced version] Lord Cave's handwritten note endorsed on letter.

³²⁸ J.114/1. Entry for 12 November 1944

³²⁹ J114/2 29 January 1946 *Davis v Solomon*. Dilapidations case. Judgement for defendants for £70 with costs and leave to enforce.

³³⁰ J114/8 pp. 9-10 [HPIM 1818]

³³¹ Official Referee 1943-1949. Formerly appointed Judge Advocate of the Fleet while holding his post at the Bar. He was also Recorder of Plymouth. *The Times*. 21 July 1933.p.16.Issue:46502.col.D. He was also a Commissioner of Assizes appointed on the Midlands Circuit in July 1948. *The Times*. 10 July 1948.p.3.Issue: 51120.col.C.

³³² J114/6 p.15 [FR 0070] This was for an account of partnership debts.

³³³ J114/8 at p. 205. Here the parties managed to arrive at a settlement. This was produced in the form of an order of settlement. Evidence taken 18 January 1949.

In Eastham's report to Lord Jowitt³³⁴ he describes an action by the plaintiff the owner of land in Durham who claimed damages from the defendant a colliery company for subsidence caused to the plaintiff's land by mining operations. Liability and damages were tried by the referee at Newcastle for the convenience of the parties.

Such sittings at the convenience of the parties must be considered a time and cost saving exercise.

3.13 Conclusions

By way of a literature review and qualitative analysis we have examined a rudimentary concept of caseflow management and an innovative interlocutory process. We have established the basis for my theory that case management (including a form of ADR) was invented in England by the referees long before the Pound Conference in the United States or the civil justice reforms of 1996. The theory that this process made referees more efficient remains to be tested in later chapters.

Here we may conclude:

First, the earliest evidence of caseflow management in the court was Newbolt's Report in July 1920. I find that he and his colleagues continued to utilise his "Scheme" before the war.

Second, that Newbolt created a process of expert determination more than half a century before the benefit of such expedient was perceived by the legal profession.

Third, that Newbolt invented the idea of a court expert.

Fourth, that Newbolt pioneered effective cost saving devices such as identification of preliminary issues; early case directions; referral to an agreed expert and use of experts to examine other experts, as well as dispensation of formalities such as formal pleadings in certain cases. This answers to some extent research questions (c) - (e)

Fifth, he advocated the proportionate use of time and related the value of the claim to the costs of the case,

Sixth, the referees' case managed through an early summons for directions process and pre-trial summons taking the opportunity to encourage settlement.

Finally they acted flexibly like their predecessors in sitting at locations convenient to the parties and visiting the site.

³³⁴ n.311 above.

In summary Newbolt and his colleagues demonstrated a rudimentary form of caseflow management which included an informal settlement process through what he termed “an intelligent use of a court of justice by businessmen.”³³⁵

Such findings answer the research question at paragraph 1.6 (b) and strengthen the case for my theory that their case management process made the referees more effective and efficient. It incidentally challenges the view that the courts have only recently entertained an interest in what Professor Sander called “alternative primary processes” or enthusiasm for settlement.³³⁶

³³⁵ n.2 p. 438-439.

³³⁶ F.E.A. Sander. ‘Varieties of Dispute Processing’ (1976) 70 Federal Rules Decisions 79. pp. 126-127, and 130-132.

CHAPTER 4

FROM RUDIMENTARY PROTOTYPES TO AN EARLY MODEL FORM OF MICRO-CASEFLOW MANAGEMENT

4.1 In search of Newbolt's "Scheme"

In chapter 2 we answered our first research question (a) as to why the office of referee was invented, and in chapter 3 we answered the second question (b) and partially answered (c) (d) and (e).³³⁷ Having identified the "Scheme" we now trace its survival as well as its impact in the context of Newbolt's successors. This we do by way of a further literature review and qualitative analysis of the referees' notebooks and Minute Book records.

4.2 The Eastham Memorandum

Before embarking on that analysis it is important for us to establish whether there is any similar evidence such as the Newbolt report of July 1920 to Lord Birkenhead.

Newbolt's successor as Senior Official Referee was Eastham. His correspondence with Napier, Lord Jowitt's Permanent Secretary,³³⁸ throws some light on the importance of the referee's role at the time:³³⁹

The work done by the Official Referees is only comparable with that done by High Court Judges when trying long non-jury actions and it is more difficult, important and requires more legal experience (all these Official Referees are King's Counsel of at least 10 years standing) than the work of County Court Judges, Stipendiary Magistrates, Masters of the High Court and Registrars in Bankruptcy.

In July 1954, after his retirement from the Bench, Eastham sent the Lord Chancellor a significant memorandum.³⁴⁰ His covering letter to the Lord Chancellor's Private Secretary,³⁴¹ Hume Boggis Rolfe stated:

Westcott House
Westcott
Nr Dorking

13th July 1954

Dear Boggis Rolfe

Thanks to Napier and you I have at last got my increased pension in my pocket. Now I have nothing to do, I spend a lot of time thinking, with the result I

³³⁷ See: paragraph 1.6. above.

³³⁸ Lord Chancellor. 1945-51.

³³⁹ LCO 4/153 [HPIM 0789/0790] Letter Eastham to Napier 28 January 1947.

³⁴⁰ LCO 2/5976 [HPIM0936]

³⁴¹ Appointed 1 March 1949.

have drafted and had typed a memo which embodies many of the answers to the questions you asked me when I called to thank you for what you and the Lord Chancellor's Department had done for the Official Referees' pensions. This memo is the outcome of much thought and I should like you to show it to Coldstream.³⁴² He was on the Evershed Committee and questioned me when I gave evidence. I would like to have discussed it with him, and answered any questions he wished to raise.³⁴³

Eastham's letter confirms the employment difficulties the referees had with regard to pensions regardless of which Eastham was keen to relate his particular experience advocating reform.

Memorandum³⁴⁴

After spending 15 years almost exclusively trying long non-jury actions I am convinced that the serious delay in trying long non-jury actions could be substantially diminished.

My suggestion is to include in the next Bill dealing with legal reforms, the few reforms affecting the Official Referees and the trial of long non-jury actions, reforms that were unanimously recommended by the Evershed Committee.

They are set out on two pages 39 to 40 of their Second Interim Report and ought to be read as part of this note.³⁴⁵

- a. Widen the discretionary power to refer long non-jury actions to the Official Referees as recommended on page 44 (3(b)). The Evershed Committee said this could be done 'with advantage to litigants'.

At the same time include recommendations 30 and 40 on pages 44 and 45.

[paragraphs 2-6 concerned pension and status issues]

7. Appeals on Fact (see Transcript of my speech on retirement).

Most of these reforms were included in a Bill drafted about two years ago and approved by the Lord Chancellor's Department.

³⁴² He was a legal assistant in the Lord Chancellor's office from 1939-1940 and for the next 10 years Deputy Clerk to the Crown in Chancery and Assistant Permanent Secretary to the Lord Chancellor.

³⁴³ LCO. 2/5976. [HPIM 0936]

³⁴⁴ LCO 4/417. *Official Referees. Appointment of Deputies and Question of Temporary Assistance.*

³⁴⁵ n.38

If these reforms were adopted, Masters and High Court Judges would be able to refer many more long non-jury actions for trial to Assistant Judges, (Official Referees) and there are many such actions in the long non-jury list that are suitable before trial before Assistant Judges, especially actions in contract.

....

It cannot be said that the trials before Official Referees do not give satisfaction to the litigants and the legal profession, as trials before Official Referees during the past ten years have increased more than three-fold.

The Assistant Judges would be able to give early dates for trials. *The Official Referees often try cases within a few weeks after the order of reference.*³⁴⁶ Cases in the long non-jury list have to wait months for trial.

If these suggested reforms are adopted, they would substantially diminish the present delay of trying long non-jury actions.

It would probably mean that more Assistant Judges would have to be appointed, but if so, specially suitable men could be selected from practicing members of the Bar, preferably Silks who had considerable experience in conducting long non-jury actions who are accustomed to separate *trimmings from essentials*.³⁴⁷ Such men would probably try long non-jury actions much quicker than many High Court Judges whose practice at the Bar had been more of a general character.

In support of these views I should like to add the short speech of the Attorney General and my short reply on the occasion of my last day in court prior to my retirement. I understand the Lord Chancellor's office have a transcript.³⁴⁸

If any further information is required I should be able to supply it.

T. Eastham.

12th July 1954.

³⁴⁶ Author's italics.

³⁴⁷ Author's italics. [HPIM 0938]

³⁴⁸ Not found in the Lord Chancellor's files.

There are several interesting indicators in this Memorandum³⁴⁹ that support my hypothesis. First, a hint of caseload management techniques in so far as non-jury list trial times could be reduced. Second, whilst Eastham acknowledges an increase in workload, a threefold increase in the previous decade; he invites more long non-jury cases, especially actions in contract for reference. This could not have happened if the court was inefficient. This supports the hypothesis suggesting the court was efficient. Third, and this is most telling, he says that referee cases are often tried “within a few weeks after the order of reference.” It also supports the hypothesis in terms of an efficient disposal of business. This is further evidence of the survival of Newbolt’s “Scheme” and micro-caseload management. It is important to recall what Newbolt wrote in his seminal article:³⁵⁰

The result of three years experience is the feeling that a trial ought to take place in normal cases within a few weeks of the writ, at a fraction of the old cost, and that quite a considerable number of the normal cases do not require a trial at any length at all.

Newbolt’s vision thus became a reality. It was not just what he practised, as other evidence has shown, but the practice that was continued, as we shall see, by Eastham and others.

Under the *Rules of the Supreme Court 1883* there was no facility for micro-caseload management as described here and if the traditional procedure was followed in the reference it was unlikely that a trial would take place within a matter of weeks.

Eastham suggested that more suitable candidates be appointed, preferably those with experience of conducting long non-jury cases. His reference to “trimmings from essentials” is another sign of a more interventionist and activist type of judge getting to the point quickly without wasting time and dealing with the key issues in the case. This more efficient use of court time must be regarded as the underpinning of micro-caseload management in this context. His Memorandum indicates that referees like Eastham were only too well aware of the frustration suffered by litigants faced with judges who did not understand the technical side of the case or apply a correct legal analysis. These qualities of competence are essential equipment for the effective use of caseload management in this context. Eastham also hints here at a more activist role. He suggests that High Court judges in the 1950s were not so efficient because they did not have specialist experience at the Bar in long non-jury actions. He also notes two aspects of caseload management. First, the fact that cases could be tried within weeks of

³⁴⁹ LCO 4/417. [HPIM 0938]

³⁵⁰ n.2 p.439

referral supports caseload management at the interlocutory stage. Second, he infers a manifestation of case management in the trial where the judge is more active because of his knowledge and experience with long non-jury cases.

At this time despite Evershed³⁵¹ there was some unease about delay. Some months later on 17 November 1954 a report appeared in a column of the *Times* concerning long non-jury cases.³⁵² The fact that this was cut out from the newspaper and placed in the Lord Chancellor's file indicates concern in relation to what Eastham was writing at this time.

The Times reported:

The Long Non-Jury list of actions in the Queen's Bench Division, published yesterday, shows that, in the majority of cases in this list, there is a period of at least 10 months between the date of setting down for trial and the hearing. A case is not set down for trial before the pleadings are closed and other interlocutory matters dealt with.

The list contains 466 cases. Of these 351 [were] set down between February 1 and April 6, 1954, are headed: "The undermentioned actions will not be taken before Monday November 22." Of the remaining 113, which it may be assumed the Court will shortly be able to try, 50 were entered in January 1954, three on February 1 or 2, 1954, 12 in December, 1953, and 16 earlier. A case also appears in the list entered on March 22 of this year and another (apparently to be tried with an action entered in January) on July 30, 1954. The earliest case was entered on January 22, 1953.³⁵³

The delay in fixing a trial date in ordinary Queen's Bench actions was avoided by the referees' practice. At first directions hearing the referees would fix the trial date. This avoided the problems described by *The Times*.

Before considering further examples of the Newbolt "Scheme" in the post-war era there were two other facets of referee activity that should be noted where the referee acted as "a jury" and as "an arbitrator."

4.2.1 Acting as a jury

In *Harris v Rex Foods*³⁵⁴ a reference was made on 5 April 1946 for the assessment of damages and in that case the referee acted as a jury. In the following year there were two other cases where the referee acted in that capacity: *Zenith Skin Trading Company v Frankel*³⁵⁵ a partnership dispute where the referee acted as a jury in fixing the price³⁵⁶ and *E S Moss Ltd v J Gremel*,³⁵⁷ a claim for the cost of building work done where the

³⁵¹ n.32.

³⁵² LCO 2/5976 [HPIM0939]

³⁵³ LCO 2/5976 [HPIM0939]

³⁵⁴ J.114/3 [CIMG 0034]

³⁵⁵ J.114/4 [CIMG 0049]

³⁵⁶ Eastham noted: "I don't believe the defendant's explanations about the sales he alleges. The only real issue is the price to be fixed on 63 furs."

³⁵⁷ J.114/2 [HPIM1798]

referee awarded £250 as judgment for Plaintiffs and costs to be taxed. In *Beswarwick v Woodbridge*³⁵⁸ and in *Frederick Baden Powell v John Southern*³⁵⁹ Eastham assessed damages and the making good of building defects “as a jury.”

4.2.2. Acting as arbitrator

Another example of the referees extended case management powers was in acting as an arbitrator. An early example was *S.J.C. Duqueim v Atlas Assurance Company Limited*,³⁶⁰ a matter heard in November 1946, concerning the extent of fire damage to furniture and allegations as to concealment of material facts.

4.3. Further discussion and analysis of rudimentary caseflow management: methodology applied to judicial records (1946-70)

The following examples of an embryonic form of micro-caseflow management are extracted by way of example from the referees’ notebooks covering a period of 24 years. This analysis focuses on the six constituent elements of the theory described in Chapter 3. It examines the earliest and best evidence of caseflow management from the judges’ own contemporaneous notes taken in court. This examination presents a continuum of Newbolt’s “Scheme” and evaluates contributions made by Sir Tom Eastham K.C.,³⁶¹ Percy Lamb QC,³⁶² Sir Walker Kelly-Carter QC,³⁶³ Sir Norman Richards QC,³⁶⁴ and Sir William Stabb QC³⁶⁵ Here we trace the evolution of micro-caseflow management into the 1960s. We consider the type of cases that were dealt with by the referees between 1947 and 1970 with particular emphasis on those cases where such techniques accelerated the disposal and despatch of business. The analysis that follows is the result of a review of all Eastham’s Notebooks at the National Archive in the J.114 series. A review was undertaken of files J.114/1-J.114/55 which were reviewed, photographed and analysed for evidence of caseflow management practices. Whilst these notebooks were properly catalogued they were not always legible or in general chronological order. A number were out of sequence and incomplete. A fully comprehensive picture is not possible because the Notebooks do not represent a full picture. We may understand this better by reference to Tables T.6.5 and T.6.6 in

³⁵⁸ J114/28. p. 92 [SH 101389]

³⁵⁹ J.114/17 [SH 101132]

³⁶⁰ J.114/3 [CIMG 0037-0039]

³⁶¹ 1936-54.

³⁶² 1959-69

³⁶³ 1954-71.

³⁶⁴ 1963-78

³⁶⁵ 1969-85.

Chapter 6 which compares the judicial records with the statistical records. No minuted records were found for any period before 1959 so that it is very difficult to assess the time spent on a case save by reference to the days' sat in the *Judicial Statistics*.

Whilst a number of notebooks are quoted here it was not practically possible to review every notebook. Half of the surviving notebooks were reviewed and photographed and analysed for relevant material.

Having considered the earlier evidence of Newbolt's "Scheme" and Eastham's significant memorandum to Lord Jowitt we now analyse by way of a literature review and qualitative analysis the evidence of a continuation of Newbolt's "Scheme."

4.3.1 Early procedural evaluation and rudimentary informal referee resolution

There are an infrequent number of instances in the referees' notebooks where the referee intervened to encourage settlement. It seems that the guarded advice of Birkenhead was heeded to the extent that such encouragement was limited. The parties were given opportunity for discussion outside the court, facilitated by a short adjournment. At other times the referee discussed a more effective means of shortening the proceedings in court at the first directions hearing. Whilst the evidence in this chapter points to party discussions outside the courtroom there are some instances where there appears to be a fine line between purely procedural debate in chambers and a wider ranging discussion which encourages settlement. These examples are selected because the judge's intervention undoubtedly accelerated resolution.

On 17 December 1946, Eastham heard the case of the *Duke of Bedford v Augusta Marie Fallie*.³⁶⁶ His notes indicate that this was settled by consent after an adjournment. Whilst there is no cogent evidence of overt judicial intervention, the adjournment provided an opportunity for settlement as well as an incentive to save the costs of the hearing. Eastham's note reads:

1946	The Most Noble Hastings Twelfth	
December	Duke of Bedford v. Augusta Marie Fallie	
17 th		
Tuesday	Plf	Def
1 st Day	Mr A Davies	No
counsel		
	By Consent	
	Trial adjourned to the 24 th March.	
	The costs of today to be costs	

³⁶⁶ J. 114/3. Judges Notebook. 1946-48 [CIMG 0045]

in the cause.

Plf to pay Court fees.

T.E.

Action settled

On a summons

14/3/1947 Order as asked

T.E.

The case was adjourned to the 24 March 1947 and the action was settled earlier by order on the 14 March 1947. Eastham did not insist on pressing ahead with the trial on the 17 December 1946 but gave the parties time to resolve the matter. He ordered the defendant to pay the Duke £250 immediately resolving one part of the case that induced earlier settlement.³⁶⁷ In this case Eastham's considered that giving more time to the parties to reach an amicable agreement would result in a cost saving. The costs of the adjournment would be less than the costs of a full trial fixed for 24 March 1947.

Whether induced by proximity of trial or judicial encouragement to settle: time and costs were saved.

Another such instance was *William George Mellie v Mrs A Mellie (Married Woman)* heard on the 16th February 1947, a claim for damage to property. As a result the case settled on the 6th April 1948.

In *Hon. Mrs Courtney Cecil (Fem Sol) v D Ewell (Spinster)* the parties requested the judge to view the premises Eastham's notebook records:³⁶⁸

June 30th 1948

1st day

View - 2.15-3.50

Nuisance action.

At request of the parties I had a view on June 30th 1948

Defective rainwater pipe.

Subsequently he noted:

24th May 1948 Important meeting by surveyors for parties.

Agreed Schedule

French agreed dry rot caused by defective rain water pipe.

If liability £446.0.8.

An assessment of damages was carried out by the experts (surveyors) at their meeting on the 24 May 1948. They agreed that dry rot was caused by a defective rain water down pipe. They assessed quantum at £446.0.8. The parties agreed a lesser sum in order to settle the case. The referee noted as follows:

³⁶⁷ J.114/2 [HPIM 1794]

³⁶⁸ J.114/4 [HPIM1779]

Plf is entitled to £263.10.0
There is in court £295.15.0

By consent:

Judgement of (*sic*) the Defendant on the claim without costs.

Judgment for the Plaintiff on the counterclaim without costs.

Plaintiff to have liberty to withdraw the money in Court namely £295.15s.
out of court after Plaintiff has paid Court fees.

(The Judge's notebook was signed by Counsel E Emmett and by Mr Price).

In *Cruttenden v Philips*³⁶⁹ Eastham seems to have been more interventionist. He noted three issues for trial:

1. specific agreement for works for £400;
2. value of the work;
3. bad work.

He heard the builder's evidence and then valued the works at £75 without hearing further evidence.³⁷⁰

In *S Kaplin & Son (Upholsterers) Limited v Parkins* heard on the 1st May 1959³⁷¹

Carter ordered:

..(2) That the dilapidations specified in the schedule of this action (as agreed and varied with the consent of the two surveyors and initialled by them) are made good and the work therein specified done by the first day of October 1959 to the satisfaction of two surveyors are to be nominated by the Plaintiffs and the other by the Defendant or in the event of their disagreeing to the satisfaction of the Official Referee.

This is a remarkable order because the referee is placing himself almost in the position of a technical assessor accepting the work in accordance with a specification tested to his "satisfaction." This is very much an interventionist stance and can be contrasted with the next example of a passive approach.

In *Barrow Brothers (Builders Lancaster) Limited v Haworth* tried at the Lancaster District Registry³⁷² on the 3 December 1962. The case commenced at 10.30 and the plaintiff's counsel asked for an adjournment of 5 minutes. The referee then entered judgment as follows:

Judgment for the Plaintiff.

£2375 and costs fixed at £350.

No execution for judgment on loss before 1st June 1963.

³⁶⁹ J.114/35 [HPIM 2784] 30 January 1958.

³⁷⁰ J.114/35 [HPIM 2760 and 2761] is the index which has only one reference to the case at p.146. There was no further reference in the book.

³⁷¹ J. 116/1 [CIMG 0160]

³⁷² J.116/1 p. 296 [CIMG 0200]

By Consent pay to the Plaintiff's solicitors £250.....as security to Plaintiff's solicitors without further authority.

Whilst there is no evidence of referee intervention here, the referee readily granted a short adjournment. This resulted in a quick settlement saving the costs of the trial.

A similar passive approach was followed in many building cases such as *Webbs Asphalt Roofing & Flooring Co Ltd v Roper & BRM Shopfronts (A Firm)*³⁷³ heard on the 14 March 1966 before Walker Carter Q.C.³⁷⁴. Webbs paid £315 to B.R.M. B.R.M's work was worthless. An adjournment on the first day of the trial was followed by a further adjournment on the second day until the parties confirmed they had settled with no order save as to costs.³⁷⁵ The court was engaged in that exercise for 10 minutes.³⁷⁶

A similar stance was followed in *Leighton v Tait & Alt*³⁷⁷ a defects case heard by Carter on the 31 October 1966. The judge's notebook³⁷⁸ records that by agreement £1,850 was paid out of court following an adjournment of the trial.

There are two instances of Newbolt's informal "discussions in chambers" recorded in the notebooks after the war: *W J Barrs Limited v Thomas Foulkes*³⁷⁹ and *Clifton Shipways Co Limited v Charles Lane*³⁸⁰ considered at paragraph 4.5.1 below.

After the war it appears that such discussions were more formal in open court. It is difficult to generalise, but it does appear that on occasion Carter adopted a more activist approach to Eastham's more cautious passive approach.

4.3.2 Judicial intervention promoting economy and expedition³⁸¹ **Eastham**

On the 27 November 1944³⁸² Eastham's notes record that he was asked to assess damages in *Great Western Railway Company v Port Talbot Dry Docks* a marine salvage case. He gave judgment for £42,567 for the Plaintiffs. Eastham encouraged the parties' experts to agree quantum which they did saving further time and cost during the trial.

³⁷³ J.116/3 [CIMG. 0106]

³⁷⁴ Official Referee 1954-1971.

³⁷⁵ J.116/3. Entry 15th March 1966 second day of trial. [CIMG. 0107]

³⁷⁶ J.116/1 [CIMG 0177]

³⁷⁷ J.116/3 p.189 [SH101091]

³⁷⁸ J.114/49 p. 121 [SH101957]

³⁷⁹ J116/3 [CIMG. 0102]

³⁸⁰ J116/1 [CIMG 0176]

³⁸¹ There are a number of examples in the Notebooks and the Minute Books suggesting referee intervention. From an analysis of the Minute Books for 1959-62 and 1965-67 in Tables 15 and 16 of the Appendix we note that the average time taken to achieve settlement in the course of the trial where judgement was not given was 2 hours 16 minutes in 1959-62, and 1 hour and 25 minutes in 1965-67.

³⁸² J114/1

The first of a long series of building cases recorded in the judges' notebooks was *Westheath Contractors v Borough of Grantham*.³⁸³ This was a typical building case regarding 169 building units comprising 63 separate dwellings. In an action to recover damages for defective work the referee took into account the value of the work that had not been done and reduced the claim accordingly. He then ordered the parties to agree quantum saving further time and costs.

Allied Ltd v Peerless Representative (London) Ltd,³⁸⁴ a claim by shipping agents for commission was tried on the 6 March 1947. The matter settled after the judge had questioned counsel on the value of the disputed items.

A small claim for car repair damages, *London and Canterbury Motors (A Firm) v B L Koppen*³⁸⁵ was heard on the 10 March 1947 and was settled on terms that:

By consent
Judgement for the Plaintiffs for £85
Costs agreed at £31.10s.
Leave to proceed on terms set out in the order on consent.

Settlement was effected immediately subject to the defendants paying £16.10s. to the plaintiff within 7 days.

In Eastham's Report to Lord Jowitt in 1947³⁸⁶ he refers to a referral from the Court of Appeal to a referee for determination of damages relating to removable fixtures at a greyhound racing track. The parties were represented by King's Counsel and after a four-day hearing and some observations by the referee indicating the way he was thinking the action was settled for £95,000.

A key component of case management was encouragement to agree the facts, issues, law or indeed the whole case to save time and cost. What referees were trying to do was to get parties to work together as in arbitration by agreeing between them as many issues as possible. Whilst the evidence here is sketchy there are sufficient observations in the referees' notebooks to support this element of the theory.

Eastham's entry for 11 December 1947³⁸⁷ noting *Rowlett v Champion* suggests a structured settlement discussed with Eastham and sanctioned by a Consent Order whereby the defendant paid the plaintiff's costs of £542. The plaintiff paid for work done on the basis of the original quotation. There is reference in the judge's notes to the use of experts to enquire and report back to the court.

³⁸³ J 114/2 3 March 1945 [FR 0031-0037]

³⁸⁴ J.114/3 [HPIM1193]

³⁸⁵ J.114/3 [HPIM1195]

³⁸⁶ n.311

³⁸⁷ J 114/1 [HPIM 1766].

There is further evidence of referee initiative in *Modern Telephone Company v Pickering*³⁸⁸ where the defendant's counsel submitted that he was unable to resist judgment. Eastham directed the plaintiff's expert accountant, Mr Delworth, to confirm that a sum was properly due. There was no cross examination and his view was accepted.

We have already noted that *Cecil v Ewell*³⁸⁹ was a building dispute involving a claim for damages for defective work. This was expedited by the judge's site visit before the trial commenced. It followed a prior meeting of surveyors to agree quantum. By consent the referee ordered judgement for the plaintiff. Both counsel in the case asked for a view of the premises prior to proceedings.³⁹⁰ The judge noted simply: "I viewed the premises". Very rarely, if ever, would a High Court judge visit the site. In these complex cases such activity saved much time and cost, and in this case dispensed with a trial altogether.

On the 17 May 1949 Eastham gave judgment³⁹¹ in *Commercial Union v Collective Investments Limited* with damages to be assessed. On 24 May 1949³⁹² Eastham noted his appointment of a court expert, Mr J. A. Furr, who was called that day to give evidence. Eastham directed Furr to visit the premises and report back to him. Mr Furr's fees were to be paid jointly by the parties.

A more important entry is that dated 24 October 1949 noting the case of *H Wheeler (Romford) Limited v T C Chilingsworth*.³⁹³ Here the parties agreed terms according to a schedule appended to an order staying proceedings. The parties accepted that each party would nominate a surveyor to inspect. The parties agreed to abide by any agreement between surveyors. In default of that the parties agreed to:

abide by the decision of a surveyor appointed by the Official Referee and to carry out any decision of his and bear any expense of the appointment in equal proportions.

This example demonstrates a concurrent consensual disputes process initiated by a referee long before the late twentieth century debate on alternative dispute resolution. This may well be the first example of expert determination in England encouraged by the referees; it undoubtedly saved the litigants' time and costs.

³⁸⁸ J114/2 p.168 [HPIM 1795] 7 May 1947

³⁸⁹ J114/1 p. 252

³⁹⁰ J 114/1 p. 169

³⁹¹ J114/6 p.176 [FR 0080]

³⁹² J114/6 p.181 [FR 0080]

³⁹³ J 114/6 p192 [FR 0085] 28 June 1949

Another aspect of this form of case management was the flexibility of the referee visiting the site and subject-matter of the action. This was particularly important in building cases in order to understand the facts.

Eastham's notes for 11 January 1950 refer to *Hiauco Limited v Tauford & Co Limited*³⁹⁴ where the plaintiffs presented a claim for £218 14s.5d. for rabbit skins. Substantial schedules of evidence were submitted to Eastham. There was no issue as to 98 of the 104 skins. As to the remaining six the issue of damages was simply a matter of six times three shillings cost amounting to eighteen shillings. After discussions with the judge the parties agreed that the claim and counterclaim be withdrawn with no order as to costs. The judge noted after a reference to pleadings being read:

By consent claim and counterclaim withdrawn.

No order as to costs.

T. Eastham.

Here we have an example of judicial activism promoting settlement and effective case management saving costs and time in what otherwise would have been a protracted forensic exercise.

On the 19 April 1951 Eastham heard a claim for dilapidations in the matter of *Frederick Baden Powell Weil v John Southern*.³⁹⁵ The works included an American bar and clubhouse, a main drive turning circle and tennis courts; £1,230 was the cost of putting the tennis courts in order. The expert thought £60 would be sufficient, other items would be £50. Eastham directed that in view of the discrepancy between the figures he would inspect the premises with the parties.

He noted:

I viewed the premises in the presence of Counsel and the parties.
Counsel agreed that no further evidence was necessary.

This clearly expedited the hearing and accelerated judgment.

The judge's note is self explanatory:

Friday 20th April (2nd day)

I viewed the premises in the presence of counsel and the parties.

Counsel agreed that no further evidence was necessary.

Dilapidations

Item 2 I admit courts not in a good condition

Submits £400 limit.

³⁹⁴ J.114/14 [CIMG 0079-0080]

³⁹⁵ J.114/17 pp. 189 and 199 [SH 101134]

Item 3 counsel dispute £55/17/7
Item 4 Agreed at £15
Item 5 agreed at £880
Item 6 must assess as jury
Item 7 £852/4/5 is the agreed figure.

After my view I assess the injury to the reversion at
£1400

55.17.7
15.0.0
880.0.0
40.0.0
852.9.5
£3,243.0.0³⁹⁶

judgement for £3243/0/0
grant relief from forfeiture on condition defendant pays£3,243/0/0.

.....

T Eastham

It is interesting to note that Eastham would assess item 6 “as a jury” not as a judge.

Eastham ordered as follows:

Grant relief from forfeiture on condition defendant pays £3,243 on following instalments;
£1,243 in 14 days from today; £1,000 in one month thereafter and £1,000 six weeks later.

There are a number of cases where the referee may have promoted settlement either because the trial was imminent, or because he gave the parties time to consider the benefits of going ahead that day, or adjourning. Such cases include *Hayland v Springet & Son*³⁹⁷ where on the 9 November 1951 Eastham gave a Consent Order immediately for £200 to be paid to the Plaintiff.

On 24 January 1952 *James Conlon T/a J Conlon & Sons v Lloyds (Builders) Limited*³⁹⁸ was heard. Mr James Comyn,³⁹⁹ represented the Plaintiff in this case. Eastham’s noted:

Parties came to terms

Defendant’s to pay Plaintiff’s £600 within 7 days from today in full and final settlement of claim and costs.

³⁹⁶ The total award should have been £3,229.7.0.

³⁹⁷ J.114/21 [CIMG 0062]

³⁹⁸ J. 114/21 [CIMG 0063]

³⁹⁹ Comyn later became President of the Family Division.

Leave to sign judgment for the said claim in default of payment in 7 days from today signed Tom Eastham.

Whilst there is no direct evidence of intervention here, the parties settled immediately. This presumes that the judge may have permitted a short adjournment before the start of the case to encourage that. If that assumption is right then it is further evidence of a more passive role by the judge in promoting settlement.

Eastham's next day entry⁴⁰⁰ records the first day of trial *Van Nuffelen v Leicester*. It appears that the parties settled at the door of the court as the judge's note states:

By consent
Judgment to be entered for the Plaintiff for £2,250 to include all costs.
Stay of execution on terms endorsed on Counsel's briefs and signed by them.
Liberty to either party to apply.

Tom Eastham.⁴⁰¹

In *Wilson v Crac*⁴⁰² a claim heard on the 7 July 1952 for the non-payment of invoices. Counsel came to an agreement after the defence submissions.

Irvin & Sons v Blake was a claim under the War Damage Act 1946 for £315.12s.1d worth of building work heard on the 14 July 1952.⁴⁰³ Judgment was given for £285.12s as experts agreed that some work done was outside the parameters of the Act and consequently £71 was excluded from the claim. Eastham ordered:

Stay of execution for 21 days from today.
If notice of appeal given and entered within that time stay to continue.
It is agreed Official Referee should state facts and law and his view of the law in writing in the event of an appeal.

On 7 October 1953 Eastham heard *Burtain Ltd v J A Tyler & Sons Ltd*.⁴⁰⁴ Here liability was admitted. The counterclaim was the only issue. The defendant had sub-contracted plastering works to the plaintiff. The defendant claimed £680 for bad work. Eastham noted:

At request of Defendant's Counsel and withdrawal of any objections on the part of the Plaintiff's Counsel I decided to view the premises to see the condition of the ceiling and the lighting of the show room and the general appearance of the show room.

Following this visit the referee noted:

Loss of use should be limited to the making good of plaintiff's defective work and the necessary work to make good. Removal of filling necessary because in place when defects discussed.

⁴⁰⁰ Friday, 25 January 1952.

⁴⁰¹ J. 114/21 [CIMG 0067]

⁴⁰² J.114/20 [HPIM1776]

⁴⁰³ J.114/24 [CIMG0546]

⁴⁰⁴ J.114/24 [CIMG 0571]

This facilitated immediate settlement.

An entry in Eastham's notebook for the 17 December 1953 in *Kefford v Brownleader* gives a similar indication where the parties counsel immediately agreed the settlement order with the judge as follows:

Action settled by Consent in terms signed by the parties and read out in court.

T. Eastham.⁴⁰⁵

The 23 November 1953 was the first day of trial of *Bedford Theatre (London) Limited v Brisford Entertainments Limited*. This was an action in detinue for £52,000. There were 185 items in the claim, 64 of which the parties had been able to agree.⁴⁰⁶ There were 121 items remaining in dispute for the judge to determine. There was a Scott Schedule, but this had not been completed by the defendants. There were five firms of solicitors involved in the litigation. By the second day of the trial, Eastham and the parties made considerable progress in one of the most complex cases noted up to that time. The judge's note reads:

1953

Tuesday

24th Nov.

(2nd day)

On defendant's submission judgment for the plaintiffs for £400 with costs to be taxed following agreement.

T. Eastham.

Considering the amount of work required and the potential length of the trial, this earlier resolution clearly saved time and cost.

Walker Carter

Eastham retired on the 21st February 1954 and was replaced by Sir Walker Kelly-Carter QC who was educated at Repton and Sydney Sussex College Cambridge. Carter served as Chairman of the East Midlands Agricultural Land Tribunal from 1948 until 1954 and was also Chairman of the Lincoln Quarter Sessions.⁴⁰⁷ He was subsequently appointed Chairman of the Criminal Injuries Compensation Board in 1964 and retired as Senior Official referee in 1971. It was said of Carter:⁴⁰⁸

⁴⁰⁵ J.114/21 p. 258 [CIMG 0077]

⁴⁰⁶ J.114/21 [CIMG 0075-0076]

⁴⁰⁷ *The Times* April 10 1985 p.12 Issue 62108 col.G

⁴⁰⁸ *The Times* April 20 1985 p.10 Issue 62117 col.G

He was not a great lawyer but he was a good Judge and an even better Chairman of a Tribunal since he had an instinctive feeling for the justice of a case and this was plain to all who appeared before him

Carter's natural sense of justice and judicial ability can be discerned in the following examples.

On the 7 May 1959 in *Martin French v Kingswood Hill Ltd*⁴⁰⁹ Carter gave leave to appeal his judgment on preliminary issues and adjourned the trial on the counterclaim subject to a proviso:

In order to save costs I propose to make the following Order. It is ordered that the further hearing of this action be adjourned to Monday the 1st day of June 1959 and that if within fourteen days the plaintiff serves Notice of Appeal against this Order and enter and prosecute the same with diligence then the hearing be further adjourned to a date to be fixed upon the application of the parties after the determination of the said appeal.
I give leave to appeal against this Order.

All questions of costs reserved to the further hearing of this action.

This may be regarded as caseflow management insofar as costs were undoubtedly saved by the allowing the appeal, avoiding wasted costs on the hearing of the counterclaim.

There is some evidence of intervention in the case of *Clifton Shipways Co Limited v Charles Lane*⁴¹⁰ and entries on the 2 March 1960. On the second day the Court resumed at 10.30 when there was some discussion about the counterclaim and a claim for set off. This was settled on acceptance of £16 being paid into court. The case was further adjourned at 12.50 resuming at 2pm and at the resumption there was an application to amend with the costs being reserved. The next day the court convened at 10.42, for 55 minutes until 11.37. There was then further discussion in court about settlement. The judge's note reads as follows:

Adjourned to consider how to proceed and when to return for further argument and evidence. Terms of settlement. Defendant agreeing to judgment for £400 and costs to be taxed if not agreed. Payment out to the plaintiff's solicitors of £200 in court.⁴¹¹

This suggests that Carter adjourned the case so that counsel and he could consider how best to proceed. It seems to be an instance of an early form of Case Management Conference which accelerated a settlement. This might be an instance where "discussions in chambers" recurred.

⁴⁰⁹ J.116/1 [HPIM1964]

⁴¹⁰ J.116/1 p.104. [CIMG 0176]

⁴¹¹ J.116/1 p.105 [CIMG 0177]

This may be contrasted with the entry on the 15 March 1960 in *James Kinross v R H Tarrant*.⁴¹² Here Carter has undoubtedly saved some costs in giving a partial judgement permitting the parties to resolve matters without further appearances in court. At the end of the hearing Carter gave judgment as noted by the clerk in the Minute Book:⁴¹³

H.H. sums up and gives Judgment as to Part II of the Schedule allowing at the rate of 3. 1/2d. per bale instead of 1d. per bale. Allow set off for Defendant for £200.

Remainder of action adjourned to Monday 28 March 1960 at 12 noon unless parties settle and produce letters and then order will incorporate terms of settlement.

The Minute Book goes on to record:

Monday 28th

March 1960

3rd Day

from 12.5 to 12.10 Terms of settlement: Def to pay £341-13-3 and £46 16s. 1d. increased bailing charges. Total £388. 9s. 4d. with no order as to costs. Judgment for the plaintiff for £388. 9s. 4d. on the claim and on the counterclaim. Payment out of £70 to the plaintiff.⁴¹⁴

Here the method is interesting in so far as the adjournment device is again used to give the parties time to settle matters without the necessity of prolonging the trial. This is another example of passive micro-caseflow management where there was no order as to costs each side bearing its own.

Another example of a stay or adjournment promoting settlement is noted in the same Minute Book on Thursday 18 May 1961⁴¹⁵. The clerk noted as follows:

Adjournment to consider settlement.

2.25. Adjourned to first day next term to allow parties to deal with terms of settlement.

Action settled: No order required see letter 24th May 1961.

On 11 October 1961, *Sergeious Papa Michael v A K Koritsas*⁴¹⁶ engaged the Court between 10.30a.m. and 10.35a.m. Carter noted:

Settled: Judgment for the plaintiff against all defendants for £1,600 and costs of claim and on the c/claim with costs.

Stay of execution providing the Defs pay £65 per month. The first payment to be on the 1 NOV 61 and thereafter on 1st of each month.

⁴¹² J.116/1 [CIMG 0178]

⁴¹³ J.116/1 [CIMG 0179]

⁴¹⁴ J.116/1 [CIMG 0179]

⁴¹⁵ J.116/1 p. 187 note cont'd from pp171 and 143 of Minute Book [CIMG 0187]

⁴¹⁶ J.116/1. p. 207. [CIMG 0190]

Site visits

In *Townsend's Builders Ltd v France*⁴¹⁷ Carter visited the site of 45 Wardour Street on the 26 June 1962 to examine the state of an alleged undulating floor. There is no record of any experts being present and the judge upon viewing its state noted:

Floor a practical preparation.

No need to take up floor

Judgt for Plff £674 10. on claim

On c/c £370

£250 paid out

Plf to have ½ costs.

This is an excellent example of judicial intervention procuring an economic and an expeditious result and also a possible example of judicial evaluation.

*W J Barrs Limited v Thomas Foulkes*⁴¹⁸ is another example of the utility of such inspections and “discussions in chambers.” The judge asked both counsel to discuss serious matters of the expert evidence. The meeting lasted an hour and three minutes. Carter was clearly concerned and wanted to view the property. After a 45 minute site visit on 11 November 1965, the parties agreed to Carter ordering that the counterclaim be dismissed and the plaintiff receive a payment out of £120. Carter’s intervention in asking counsel and experts to agree figures and visiting the site brought about a swift resolution of the case.⁴¹⁹

Directions to solicitors

Carter’s interest in settlement is significant. We find in the court file of *Alloy & Fireboard Co Ltd v F. Superstein*,⁴²⁰ another building case, a letter on the court file from Carter’s clerk to the parties’ solicitors dated 25 March 1966.⁴²¹ It stated as follows:

This action is due to come on for trial on 22 April 1966.

It is the *duty of all parties to furnish to me, without delay, all available information relating to any settlement or likelihood of settlement or affecting the estimated length of trial*⁴²² being one day.

⁴¹⁷ J.114/41. p.180. [CIMG 0638]

⁴¹⁸ J.116/3. [CIMG. 0102]

⁴¹⁹ J.116/3. [CIMG. 0103] and J.114/44. p. 249 Dec 2006 [CIMG 0705]

⁴²⁰ J.115/6. [HPIM 2705]

⁴²¹ J.115/6 .[HPIM 2716]

⁴²² Author’s italics.

Please therefore inform me immediately whether you have any information as to *the likelihood of a settlement and your advised estimate of the length of trial if any.*⁴²³

The Plaintiff's Solicitors are required *to deliver to me on or before 13 April 1966*⁴²⁴ one complete set of pleadings including all particulars given and also a copy of any schedule ordered. They are further requested to ascertain from the Defendant's Solicitors whether the latter have any objection to any agreed bundle of correspondence or other undisputed documents being delivered at the same time.

If both parties so agree, but not otherwise, such correspondence and documents should be delivered as soon as possible in order that the Official Referee may consider them before trial. This will in most cases result in the saving of time of the hearing and consequential reduction in costs.

Clerk to His Honour Walker Carter QC

This standard letter to solicitors demonstrates that Newbolt's "Scheme" survived. It also confirms the referees' interest in settlement and in saving time at trial, if not by encouraging settlement, then certainly by the judge familiarising himself with the pleadings and issues in the case.⁴²⁵

On 7 November 1966 Carter heard *Bickley v Dawson*.⁴²⁶ The judge permitted a short adjournment for ten minutes which facilitated settlement after which judgment was given for £400 and the counterclaim dismissed. This is another example of passive caseload management saving time and cost at trial.

A final example is provided by Judges Stabb and Richards.

Sir William Stabb and Sir Norman Richards

Sir Norman Richards was educated at Charterhouse and Trinity College Cambridge. He was called to the Bar in 1928 and was Deputy Chairman of the Middlesex Quarter Sessions from 1962 to 1965. He became President of the Council of Circuit Judges in 1973. He became a referee in 1963 and the Senior Official Referee in 1971 in succession to Sir Walker Kelly-Carter QC⁴²⁷ Lord Salmon wrote of him:⁴²⁸

⁴²³ Author's italics.

⁴²⁴ Author's italics.

⁴²⁵ About this time judges taking cases in the Commercial List also started giving directions and encouraging the parties to consider settlement. (Authors informal discussion with Sir Anthony Evans June 2008)

⁴²⁶ J.116/3 p.191 [SH101092] The defendant appeared in person.

⁴²⁷ *The Times* Dec 31, 1977; p. 14 Issue 60199; col.G.

⁴²⁸ *The Times* Jan 17, 1978; p. 17 Issue 60212; col.E.

Norman had a genius for recognising what really mattered and never overlooked what did.

He also had a pronounced distaste for the modern tendency of wasting much time and money in probing the irrelevant.

Sir William Stabb was appointed as a referee in 1969 after a distinguished career at the Bar. His practice included criminal and medical negligence cases, and Privy Council appeals. He was a Treasury junior at the celebrated Vassall spy Inquiry in 1963.⁴²⁹ His leading cases as a referee included *Sutcliffe v Thackarah*⁴³⁰ regarding quasi-judicial immunity and *Pirelli v Oscar Faber and Partners* regarding limitation. He was appointed Senior Official Referee in 1978 in succession to Richards.

A final example of referee intervention is *Bogen v Honeyball & Rossal Estates Limited*⁴³¹ tried before Stabb. The writ was issued on 9 May 1967 for £1,521 as unpaid fees for professional services rendered by the plaintiff as a chartered engineer. Honeyball was an architect and Rossal Estates Limited were property developers. It was alleged that in June 1966 Honeyball instructed Alec Bogen to design and provide calculations for the foundations and load bearing brickwork for 14 flats. Master Jacob referred the action to Stabb on 1 March 1973.⁴³² Stabb made a series of orders and on 26 March 1973 he gave further directions for particulars and expert reports. There was a further adjournment to 7 May 1973. On the 15 June 1973 Richards ordered Rossal to serve Further and Better Particulars of the Defence and Counterclaim and fixed the trial date for 28 November 1973. He ordered that experts' reports be exchanged by 31 July 1973.⁴³³ Following that order the action settled.⁴³⁴

This case lasted 6 years. There was an almost eight month delay between the transfer order and the giving of directions. The catalyst for settlement was Richards' order for particulars, exchange of experts' reports and fixing the trial date.

The above examples give tantalising glimpses of an early form of caseflow management illustrating an activist, and at times a passive approach, to caseflow management. Each approach supports the hypothesis as to the existence of such process and its effectiveness in procuring earlier resolution. Of particular interest is Carter's clerk's standard letter to solicitors about settlement: clear evidence of a judicial interest in saving time and cost in court.

⁴²⁹ *The Times* Jan 30, 1963; p. 6 Issue 55612; col.A.

⁴³⁰ [1974] AC 727

⁴³¹ J.115/49.[HPIM 2749]

⁴³² J.115/49 [HPIM 2752]

⁴³³ J.115/49 [HPIM 2758]

⁴³⁴ J.115/49 Letter dated 19 July 1973.[HPIM 2759]

4.3.3. Experts.

(a) Use of single joint expert/court expert

On the 28 June 1948 Eastham heard the case of *Benoir Hamburges v Winifred Stort*.⁴³⁵ This was a claim for damages for dilapidations and breach of repairing covenant to deliver up premises in “good tenantable repair and condition” at the end of the tenancy of the premises at 36a Holland Park Ave, Kensington. The claim arose out of the War Damage Act 1946 and was challenged on the basis that it was excessive with respect to costs of cleaning, redecorating and re-pointing. An expert gave evidence that damage was somewhere in the region of £50. Eastham noted:

I accept in the main Mr Davis’ evidence.
I assess the injury to the reversion at £95.

In *Albert Colegate v D Raymark (Married Woman)* another war damage repair claim there is reference in the judge’s notes to the court expert’s views being read and his visit to the premises to inspect and report on the state of disrepair.⁴³⁶ The judges note for 24 May 1949 reads:

9 March 1949 Report of court expert read.

And subsequently:

Court expert called for cross-examination
John Austen Farr
Appointed by the Court as Court Expert
I visited premises in March 1949

In *R. Corben & Son Ltd v Forte(Olympics)* ⁴³⁷ heard on the 15 January 1962 Carter in giving judgment noted:

Letter of 15th February does not constitute a contract refer to Court expert to report fair price in all the circumstances of the case. Necessary to ascertain what is a reasonable price for the work done, Cannot be costs plus contract. Court should fix reasonable price that a reasonable builder would charge in the circumstances. Unless parties agree to it.... Suggest O(rder) 37a which deals with Court Expert- a Quantity Surveyor to be told by plaintiffs of difficulty in doing Works-he should then report to the Court. He should hear evidence-and then either accept report (or) if not accepted to be called for cross-examination. Contract to do work for reasonable price.

Adjourned generally to apply for further step to be taken.

Stand over costs and declaration on the issue.

⁴³⁵ J.114/5 [HPIM 1232]

⁴³⁶ J.114/6 [PRO II (FR) 082]

⁴³⁷ J.116/1, p. 242 [Oct.2006 Series, HPIM 2088]

Here Carter decided that the letter did not constitute the terms of the building contract and that neither party was bound by it. Reading the judge's notes, it would appear that the referee was not satisfied with the builder's prices and that having decided the issue he then considered the alternative plea of *quantum meruit* or reasonable price for the works carried out. Again the expert is used as a quantifier of damages.

*Leon v Beales*⁴³⁸ was referred to the Court from the Swindon District Registry. Carter's note records at 10.30-10.40 on the second day of the trial, 8 February 1962:⁴³⁹

Parties having come to terms of settlement and the Plaintiff by his Counsel undertaking to carry out the remedial work set out in the counterclaim under the supervision and to the reasonable satisfaction of an independent surveyor to be appointed by the Plaintiff and Defendant's surveyors. The Plaintiff to be responsible for such independent surveyor's fees.

It is ordered that the hearing of the action be adjourned generally with liberty to restore.

This is not only an extension of Newbolt's use of experts, but possibly an example of encouraging settlement⁴⁴⁰ by the use of experts at a more practical level. It contrasts with the earlier experiments conducted by Eastham, in *H Wheeler (Romford) Limited v T.C. Chilingsworth*⁴⁴¹ and his use of a third surveyor as in Party Wall Act proceedings. The device used here is simply a matter of agreement between the parties endorsed by the court providing assurance to the employer that the builder will carry out the remedial works properly.

In *Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and Nathan Bernard and Ruth Bernard*⁴⁴² the Minute Book records that at 10.30a.m. on 10 May 1962 following an adjournment counsel attended Carter in his chambers to consider the appointment of a court expert. It is possible to cross-reference this case to the judge's notebook.⁴⁴³ The entry for Tuesday 8 May 1962 (2nd day) says:

Counsel attended His Honour in His Room to consent to terms of reference and appointment of Two Court Experts. Adjourned on Summons until 11th May

The Minute Book states that in the course of the afternoon the parties agreed terms of reference for an expert. The next day (11 May 1962) Counsel was handed a copy memorandum prepared by the referee amending the terms of reference. There was an adjourned hearing on the 14 June 1962, and two further hearings in July when there was

⁴³⁸ J.116/1. p.245. 7 February 1962.[CIMG 0192]

⁴³⁹ J.116/1.[CIMG 0193]

⁴⁴⁰ J.116/1 [CIMG 0194]

⁴⁴¹ J.114/6 p.192 FRO 85. 28 June 1949

⁴⁴² J.116/1 [CIMG 195]

⁴⁴³ J.114/34 [SH 101366-67]

further discussion on the draft memorandum and further amendments were made by the Court and Counsel. At a hearing on 18 July a consent order was made in the following terms:⁴⁴⁴

Plaintiff bound by the first Court Expert's report.
Report cannot be criticized.
Mr Anthony being perfectly fair to the parties.
Perfectly logical and proper Report.
Second court expert misunderstood function. Performed two tasks one of which was no longer an issue when case was settled. Spent a lot of time dealing with the matter unnecessarily. If that was all he did he should have sent it back⁴⁴⁵.
.....
[The first expert] Has applied his mind to question and answered it.
Seperates wheat from chaff etc. Did not affect answer.
Satisfied that proper course.
Judgment for Defendants on Claim
Counterclaim for £177.19.6.
Right to say about entirety of agreements that they can't get out of it because right answer is not produced.
Judgment in way indicated.
Claim dismissed with costs. Judgment on C/Claim for £177.19.6. with costs.
Special Allowance for the defendant's solicitors on 29 July 1963.
Can't see reason why costs should not follow the event.
Order Court experts to be paid by the plaintiff within 14 days undertaking as to pay shall have effect.
General costs to follow the event.
First expert to reimburse £525 to defendant's solicitors⁴⁴⁶.
Stay to first day of new term

There were a number of adjourned hearings. The final hearing (third day) was held on the 11 March 1964 when Carter noted:

1. Second Court expert has misunderstood his instructions-has made a finding as to whether the
2. Court has the right to admit further evidence
3. He has applied his mind to the wrong circumstances

What is significant here is the difficulty and possible complexity of the case and the nine hearings and discussions that took place in chambers. Orders for court experts were a rarity in those days and experts did not have much experience in so acting which may account for the misunderstanding in this case. Here is an example of referee intervention and an example of active micro-caseflow management proving that Newbolt's approach survived and was extended by Carter as well as by Eastham.

(b) Expert determination and investigators of fact

The earliest example of quantum experts agreeing "figures as figures"⁴⁴⁷ and continuing Newbolt's "Scheme" was the wartime case of *Westheath Contractors v Borough of*

⁴⁴⁴ J.116/1. [CIMG0196]

⁴⁴⁵ J.116/1. [CIMG0197] judge's note not very legible.

⁴⁴⁶ J.116/1. [CIMG 0198]

*Grantham*⁴⁴⁸ heard on the 3 March 1945. This was a heavy case involving 169 building units comprising 63 dwellings. The claim according to the referee was for:

Remediating various defects
Alternatively a claim for repayment of £12,600 paid under a mistake of fact.

On Wednesday 7 March the referee noted:

Agreements
Item 2 £272.8.1.
Item 5 £128.6.4.
Item 6 Sundry work agreed
£11.875 agreed as a figure.

In the expert's opinion the building work was a disgrace to the building trade.

Eastham noted:⁴⁴⁹

If part of the work not performed the defendants are entitled to a deduction in respect of that.
Reduce the price by the value of the work which has not been done.
Costs: allow defendants all costs except £70 of costs of the claim.

Judgment for the defendants on the claim with costs to be taxed less £70 and judgment for the defendants on the counterclaim for £3,119.6s.10p with costs to be taxed.

*Charlton Decoration Co Ltd v Robert Murray*⁴⁵⁰ was a reference transferred from the Master on the 27 October 1950 for a payment of compensatory damages by the War Damage Commission to the plaintiff for £180. The court relied upon the inspection and report of Mr Venn.

The judge ordered:

...the solicitors for the defendant undertaking to instruct the War Damage Commission to pay to the Plaintiffs direct such further sums, if any, as Mr Venn may certify to be due to the Plaintiffs and the solicitors for the Plaintiffs undertaking that the plaintiffs will carry out all instructions of Mr Venn in connection with the carrying out of the Contract.

On 31 October 1955 Eastham heard what was to become one of the leading cases on damages: *Phillips v Ward*.⁴⁵¹ This concerned building defects in terms of damage to the property by the infestation by death-watch beetle. The surveying expert had stated that the premises were in first class condition. But Eastham noted:

5 purlins. 3 valley members fractured
34 members no longer safe

⁴⁴⁷ Expression commonly used by quantity surveyors and claims consultants to agree that in the event of liability being decided a fixed agreed amount will be payable in respect of the value and measurement of work or materials on site.

⁴⁴⁸ J.114/2 [IM A0032]

⁴⁴⁹ J.114/2 [IM A0038]

⁴⁵⁰ J.114/16 [HPIM2158]

⁴⁵¹ J.114/35 [HPIM2763]

80-100 tiles have come off.
Disinfestation of timbers generally. £740 treatment
£600 opening up

35 timbers below formula.

Lord Hailsham QC appeared for the defendant who said “you shouldn’t blame the surveyor if an Elizabethan house gives trouble.” But the question was whether the particular valuer and surveyor had been negligent in advising that the property to be purchased was in first class condition when a competent surveyor might have advised otherwise. Counsel for the plaintiff confirmed that both parties required the judge to see the site. The site visit contributed in resolving what was a 9 day trial and where there was a clear conflict on quantum. The repair could be affected by patching but consideration then had to be given to its effect on value. Before giving judgement, which he did not record, the referee noted:

Schedule P.11 shows a general infection over the whole house
Measure of damages
Plaintiff should not be required to sell.
Nunn’s evidence:-
General damages for loss of (*sic*) inconvenience.
Moss v Christchurch D.C. 1925 2 Q.B.
Lake v Bushy 149 2 All E.

No examples similar to *Commercial Union v Collective Investments Limited*⁴⁵² and *H. Wheeler (Romford) Limited v T.C. Chillingworth*⁴⁵³ have been found in the records researched for this chapter, save the case of *Hogg v Barnand*⁴⁵⁴ heard on 21 November 1955 by Percy Lamb QC. The case concerned a fraud perpetrated in the sale of a timber consignment of coffin boards. Lamb was assisted by Mr Simmonds, a consulting engineer, as an assessor. Simmonds had 35 years experience.⁴⁵⁵ Lamb gave judgment on 12 January 1956.

His notes stated:

Judgment contains a miscellany of figures not a note of the judgment.

The judgment refers to the subject matter: round timber, round and standby timber, various sales of stock, valuations of vehicles and timber in yard and other miscellaneous items which the judge could not examine.⁴⁵⁶ His final note reads:

Vehicles Bedford £1094 negligently handled
Vauxhall 450 532.

⁴⁵² J.114/6 [FRO 080.] 17 May 1949

⁴⁵³ J.114/6 [FRO 085] 28 June 1949.

⁴⁵⁴ J.114/35. p. 33 [HPIM 2766]

⁴⁵⁵ J.114/35. p. 84 [HPIM 2767]

⁴⁵⁶ J.114/35 [HPIM 2769]

Miscellaneous items

No time to examine them all.

The note of judgment is incoherent and must have been delivered *viva voce* in court following deliberations between the referee and the assessor. This is not expert determination but an instance of expert assisted referee determination. Here experts are being used to evaluate damages so expediting judgement.

(c) Experts and settlement

Prails Motors Ltd v Hills Bros and Mussell heard by Eastham sitting at Hereford Crown Court⁴⁵⁷ on the 3 March 1953 concerned the purchase of an Austin car with a truck body and a 20 horse power engine.⁴⁵⁸ Apart from the convenience of the sitting of the court in Hereford the other case management factor was the use of the experts. After stating:

I find as fact that defendants have priced the special contract
That plaintiffs agreed to do repairs to the engine for £75

Eastham noted:

At the request of both Counsel I adjourned to allow them to consult their experts
and for the experts to try to agree figures on the basis of my above finding.

What is more significant is the note which he made on page 8 of his notebook it read:

p.m.

Counsel and the experts had agreed this cost of the materials for the repairs other than the engine repairs-they were trying to agree the labour charge for such repairs.

Adjourned to March 4/3/53

T.E.

Midday Wednesday 4th March

Chassis material and labour was to be £78/6/6

The electrical material labour

We agreed the electrical with materials and labour at £35/8/6

Balance of the plts bill agreed at £63.

The only question left is costs.

£35 paid into court.

T Eastham.

On 7 June 1961 Carter's first Minute Book records that the hearing of *John Fletcher Suter v W Pikta*⁴⁵⁹ occupied the court for 5 hours and 10 minutes. That day plans, drawings, photographs and invoices were examined. Mr Denger an expert witness was called after the plaintiff had given evidence. He was examined for 20 minutes and cross-

⁴⁵⁷ J.114/28. p.1. [SH 101372]

⁴⁵⁸ J.114/28 p.1. [SH 101372]

⁴⁵⁹ J.116/1 [CIMG 0188]

examined for 1 hour and 40 minutes after which the case was settled on the following terms:

By Consent. Judgment for the Defendant on the claim and counterclaim for £30 to be paid at the rate of £1 per month with the first payment on 7 July 1961 and each subsequent payment on the 7th of each subsequent month.⁴⁶⁰

The notes show that it was the intervention of the expert's evidence that was the catalyst in bringing about settlement.

4.3.4 Application of proportionality on costs

The notebooks of Eastham contain a number of costs orders that may be seen in the context of a caseflow management device which would not be out of place today.

These costs orders generally followed the event, but sometimes the referee exercised his discretion to make proportionate orders as follows:

In *London and Canterbury Motors (A Firm) v B L Koppen*⁴⁶¹ a case involving car repairs the case settled immediately in Court on terms of Judgement for the plaintiffs for £85 with

costs agreed at £31.10s. with leave to proceed on terms set out in the order on consent. Subject to Defendants paying to the Plaintiff sum of £16.10s. within 7 days of the date of the order and the balance of £100 being paid by Defendant to Plaintiffs in four equal weekly instalments in the sum of £25 commencing on 9 March 1947

A better example is the following form of order found in the note of *Zenith Skin Trading Co Lts v Frankel* heard on the 20 November 1947 in Eastham's second notebook, it states:⁴⁶²

I dismiss the claim without costs.
I order that the costs of the Plaintiff on the counterclaim be taxed and each party should pay its own costs up to the date of the first hearing and that the Plaintiff's costs of the first day's hearing should be borne 70% by the Defendant and 30% by the Plaintiff and that all subsequent costs be paid by the Defendant to the Plaintiff.

This seems a fair and proportionate order having regard to the circumstances as the referee found them having more in common with today's orders than the 1940s.

In *Benoir Hamburges v Winifred Stort* Eastham made the following order on 28 June 1948:⁴⁶³

Judgment for the Plaintiff for £95 with costs to be taxed on Scale C of the County Court Scales with all necessary costs to be paid to the expert witness Mr

⁴⁶⁰ J.116/1. p. 186.[CIMG 0188]

⁴⁶¹ J.114/3 [HPIM1195]

⁴⁶² J.114/4 pp. 117-121[CIMG 0049]

⁴⁶³ J.114/5 [HPIM1232]

Davis. The taxing master to have full discretion in increasing any items in the County Court scale that can be increased by a C.C. judge or Registrar.
Money in court (£50) to be paid out to the plaintiff's solicitors without further authority in part satisfaction of the judgement.

In the War Damage Act claim of *Albert Colegate v D Raymark (Married Woman)* for £153 Eastham made the following order:⁴⁶⁴

Judgment for Defendant on Counterclaim for £21 with costs to be taxed. Said sums and costs to be set off against each other.
Court experts fees were fixed by Judge at 8 Guineas to be paid by Plaintiff and Defendant to pay to Plaintiff 4 Guineas.
Money in Court £100 to be paid out to Plaintiff's Solicitors without further authority, in part satisfaction of judgment. Leave to proceed under Civil Emergency Powers Act 1943 to enforce Judgment after taxation of costs.

On the 30 January 1949 Eastham heard *Jays (Engineers) Ltd v Housegoods Limited* a case concerning the delivery of 101 gross frames delivered by Plaintiffs to Defendants in January 1946.⁴⁶⁵ He gave judgment for the defendant for £380.4s.4d with costs to be taxed. He ordered:

For hearing on 07/05 Defendants to have 2/3 taxed costs of that day. Costs of first trial on 16/17 April 47 be paid as follows:
Defendant to pay Plaintiff's taxed costs of claim and Plaintiff's to pay Defendants taxed costs of their counterclaim.
Money in Court £149.7s.11d to be paid to Defendant's Solicitors without further authority.

In *H Wheeler (Romford) Ltd v F C Chillingworth* Eastham made an order on the 28 June 1949 which was much ahead of its time. The costs order was novel in so far as he ordered the parties to bear the expenses of the appointment of experts in equal proportions. Each side was to bear their own costs.⁴⁶⁶

On 11 January 1951 Eastham tried *Palmers Hebburn Company Limited v The Grimsby Steam Fishing Vessel Mutual Insurance and Protecting Co Ltd and Shire Trawlers Ltd*.⁴⁶⁷ This case concerned the cost of repair to a trawler engine which had been converted from coal to oil burning. Eastham ordered a payment out of £18,000 by the marine insurers to be paid out of funds of £15,051 in court and £2,949 out of a joint account. Costs were awarded against the defendants. Eastham took into account an earlier offer of settlement for £9,750.

⁴⁶⁴ J.114/6 [PROII FR082]

⁴⁶⁵ J.114/6 [PROII FR074] paragraph 3.8.2. above.

⁴⁶⁶ J.114/6 [PROII FR085] paragraph 4.3.2. above

⁴⁶⁷ J.114/16 p. 96 [HPIM2172]

On 9 November 1951, the last day of the trial of *Hayland v Springet & Son* Eastham ordered: ⁴⁶⁸

BY CONSENT:

Claim settled on terms that the Defendants pay to the Plaintiff's Solicitors the sum of £200 in full and final settlement of the claim and costs.

Payment to be made within 7 days.

In default of payment the Plaintiff to be at liberty to enter final judgment for the said sum of £200 without further order.

That the counterclaim be dismissed.⁴⁶⁹

In *Dawes v Papdimitiou* heard on the 24 November 1952 judgment was given for the plaintiff for £250 on the claim and on the counterclaim, but no order was made on costs.⁴⁷⁰

A more sophisticated order was issued by Eastham in *Burtain Ltd v J A Tyler & Sons Ltd* on the 7 October 1953 where liability being admitted only the counterclaim was in issue.⁴⁷¹ Here he ordered:

Plaintiffs to pay the costs of the claim and counterclaim up to 29 September 1953 and all costs subsequent after that date except the sum of £30 to be paid by Defendants to Plaintiffs.

In *Ridley & Ors v Kopisitzer* heard on the 4th June 1958 the referee conducted an accounts enquiry and awarded the plaintiffs the sum of £400, and ordered the defendant to pay £180 towards their costs.⁴⁷²

On the 11 March 1960 in *J.H. Plant Ltd v Smithson* following the plaintiff's address the referee ordered: ⁴⁷³

H.H. gives judgement for £399.15.3 and 9/10 of whole costs.

£200 paid into Court be paid out to Plaintiff's solicitors.

9/10 are costs of claim and counterclaim to avoid giving defendant a separate judgement for costs on the counterclaim.

This form of order demonstrates a more precise approach to apportioning costs.

Another proportionate costs order is that exhibited in *Adkins v Joseph Cade & Co Ltd* tried by Carter in 1958⁴⁷⁴ where he ordered:

Order for payment of £350 to Plfs solicitors without further authority.

Order for Defdt pay to the Plfs costs of claim and counterclaim up to 17th January 1958. Such costs to be taxed or agreed.

Order Plfs pay Defts costs of claim and counterclaim from 17th January 1958. Set off one set of costs against or execution for balance only.

No costs of amendment.

⁴⁶⁸ J.114/21 [CIMG 0061]

⁴⁶⁹ J.114/21 [CIMG 0062]

⁴⁷⁰ J.114/24 [CIMG0563]

⁴⁷¹ J.114/24 [CIMG0571]

⁴⁷² J.114/35 [HPIM2794]

⁴⁷³ J.116/1 [HPIM 2015]

⁴⁷⁴ J.114/34 p.87. [SH 10330]

Apart from these early examples of proportionate costs orders there is an example noted in Minute Book J116/2 which is possibly unique, certainly no equivalent in what has been researched.⁴⁷⁵ In *Shopfitting Centre Ltd v Revuelta* a case heard on the 20 December 1962 Carter made a novel form of order whereby the defendant upon early payment would obtain a discount of the judgment sum.⁴⁷⁶ The order read:

By consent judgment for the plaintiff for £1,650 on claim, counterclaim dismissed. No order as to costs .
Execution stayed until 1/2/63 and if within that period defendant pays to plaintiff £1,400 such sum if accepted in full satisfaction of the judgement
If £1,400 paid before 1/2/63 any further execution stayed.

On 17 December 1965 in *Eaton Berry Ltd v King & Anor* the court ordered by consent the sum of £429.12.5. and awarded the plaintiff 50 per cent of its costs.⁴⁷⁷

In *Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties)*⁴⁷⁸ the hearing lasted 45 days and the plaintiff was given an award of £25,454 in damages. Whilst costs were awarded to the plaintiff Carter ordered that the plaintiff receive no costs for the waste of time in pointless discovery.

These examples demonstrate a more equitable and reasoned approach to awards of costs in line with modern judicial thinking apportioning costs according to the merits of the case giving a more just result.

4.3.5. Invention of special pleadings

The technical and complex nature of the referees' work meant that pleadings became voluminous and unmanageable in the hearing. We remember that to counter this George Scott devised the form of "Scott Schedule" in the 1920s,⁴⁷⁹ but as we see here other forms of schedule were also utilised as a more efficient means of presentation in court.

In *Cecil v Ewell*, previously referred to, the Judge took view of premises on 30 June 1948 and this was followed on the 24 May 1948 by an important meeting of surveyors for the parties they agreed a schedule.⁴⁸⁰ The schedule stood as the pleading in respect of the defects.

⁴⁷⁵ J.116/2 p.6 [SH 101775]

⁴⁷⁶ J.116/2 p.5 [SH 101775]

⁴⁷⁷ J.116/3 p.65 [SH101045] and J.114/47 p.69 [SH101983]

⁴⁷⁸ J.116/3 p.193 [SH101093]

⁴⁷⁹ paragraph 1.8 above

⁴⁸⁰ paragraphs.4.3.1 and 4.3.2 above

In *H Wheeler (Romford) Ltd v F C Chillingworth*, cited above, Eastham made an order whereby the parties agreed to abide by any agreement reached between surveyors to carry out remedial work. In default of such agreement the parties agreed to abide by the decision of a surveyor appointed by the referee.⁴⁸¹

After various interlocutory applications before the master *F Goff & Sons Limited v Bently Golf and Country Club Limited* was referred to Stabb who on 6 February 1974 ordered:⁴⁸²

1. That the Defendants prepare and serve upon the Plaintiffs Solicitors within 28 days a schedule of the defective work pleaded in the Defence and Counterclaim;
2. That the Plaintiffs complete such schedule within 28 days thereafter;
3. That the Plaintiffs and the Defendants do respectively within 14 days thereafter serve upon each other a list stating what documents are or have been in their possession, custody or power relating to any of the matters in question in this action;
4. That there be inspection thereof upon 2 days notice;
5. That experts reports be exchanged by the 1 October 1974;
6. That the trial of this action be fixed for 26 November 1974 the estimated duration of the trial being 2-3 days.
7. That the parties be at liberty to restore the summons.
8. That the costs of the application be costs in the cause.

Dated 6th day of February 1974⁴⁸³.

Following this standard first order on directions the case was settled on 7 May 1974. Stabb made a consent order that “the record be withdrawn terms of settlement having been agreed between the parties.”⁴⁸⁴ It would seem otiose for the master not to have dealt with a straightforward summary application on a certificate as this. These directions demonstrate; first, the effectiveness of setting the trial date at the first directions hearing, and second, the use of schedules as summaries of evidence which largely replaced pleadings at trial in defects cases. This case also demonstrates that by the 1970s the “Scheme” had evolved into a more modern approach to caseflow management.

⁴⁸¹ J.114/6 [HPIM1779] considered at paragraphs 3.8.2 and 4.3.4 above.

⁴⁸² J.115/56 [CIMG 0127, 0130 and 0139]

⁴⁸³ J.115/56 [CIMG 0143]

⁴⁸⁴ J.115/56 [CIMG 0144]

4.3.6 Preliminary issues and questions for the court

There appears to be something of a contrast between the immediate post-war cases and the 1950s cases. This is probably because it was a period of reconstruction and revival after the austerity of the Second World War. Eastham's notebooks indicate that this device is used for questions of contractual performance obligation and not for matters of non-payment.

Most of these cases took place before the publication of the *Final Report of the Supreme Court Committee on Practice and Procedure* in 1953. Eastham had correspondence with that committee and made various recommendations as previously considered. The first evidence of use of preliminary issues by this court was *George Osborne Limited v E C Goddard male* before Eastham.⁴⁸⁵ Issues were agreed on the 28 February 1950 as being:⁴⁸⁶

1. What was the contract was between the parties, in particular, what were the repairs the Plaintiffs undertook to do?
2. What is a reasonable price for the repairs actually carried out?
3. Were the repairs reasonably well executed; if not, what damages?
4. Were the Plaintiffs guilty of delay in executing the repairs and if so what damage.

On the 20 July 1950 Eastham heard an interlocutory application in *W H Armfield Ltd v John England Perfumers Ltd* for amendment of pleadings. Eastham refused the application to amend and decided to deal with preliminary issues as to:⁴⁸⁷

1. Whether there was an agreement to submit to arbitration and if there was an agreement to arbitration was there a valid arbitration bearing in mind the Defendants were never heard by the arbitrator?
2. Whether there was an award by an arbitrator or not and whether the arbitrator had authority to act as arbitrator.

In that case there was no meeting of the parties. The "arbitrator" said he was asked to value the work which was allegedly submitted to arbitration. No award was made. The referee noted the "arbitrator's" evidence:

In my investigation I came to the conclusion that the defendants owe to the plaintiffs £658/18/1.
I was employed by the defendants.
The defendants have paid my fees for services rendered.

Eastham held:

I find as fact that there was no submission to arbitration by the parties

⁴⁸⁵ J.114/14 [CIMG 0085]

⁴⁸⁶ J.114/14 [CIMG 0086]

⁴⁸⁷ J.114/19 [CIMG 0456]

I further find there never was a hearing or an arbitration.
I further find that there was no award made.
Costs reserved to trial

Judgment was given for the plaintiffs on the preliminary issue in the sum of £658.18s.1p and an order made for the plaintiffs to take all the money out of Court. Eastham's robust intervention undoubtedly saved the costs and delay in amending proceedings and dealt with the matter that day.

On the 22 November 1950 Eastham tried preliminary issues in *Jack Hyman Sockel v Issacc Francis and Salmon Matthew Francis*.⁴⁸⁸ It appears from the judge's note that the issues had been agreed by the parties and not as a result of earlier directions. Those issues were:

What was the contract in May 1948 about the area outside the garage?
What was the contract in June 1948 in respect of the garage floor?
Was an estimate and specification from Ware & Stephenson to provide the basis of the work to be done by the plaintiff?
Did the plaintiff do the work in accordance with the instructions or directions of the defendants?

The builder's work in question concerned a contract for laying 6 inches of concrete and consolidated hardcore and a proper non-dust surface. Roskill submitted that because all of these terms were broken and the workmanship was inferior, a 50 per cent deduction would be appropriate. Platts Mills for the plaintiff builder said that the standard of workmanship satisfied a cheap job. Eastham did not agree entirely with the builder awarding the building owner £45.3s.3p on his counterclaim with costs to be taxed.⁴⁸⁹

If wrong damages for not taking up floor £75.

A further example of such reference was the matter of *Dorey & Son v Foster* heard on the 4th December 1950.⁴⁹⁰ This concerned a licence to carry out work and failure to inform the Licensing Officer as to commencement of the works breaching Rule 8 Defence General Regulations 1939.

In *J C Robertson & Sons (a firm) v House* the plaintiffs, a firm of builders, contracted to underpin a semi-detached house for a price of £91 according to an agreed plan and specification.⁴⁹¹ The parties agreed preliminary questions noted by the referee as:

Has underpinning been done substantially in accordance with the terms of the specification?
What were the terms of contract?

⁴⁸⁸ J.114/15 [CIMG 0466]

⁴⁸⁹ J.114/15 [CIMG.0476]

⁴⁹⁰ J.114/14 [CIMG 0091]

⁴⁹¹ J.114/21 [CIMG 0074]

This approach demonstrates a more efficient approach to building cases with preliminary issues being agreed by counsel before commencement of the case.

In *Pepper & Co Ltd v Harry Green Ltd* Eastham tried a preliminary issue as to whether goods were in accordance with the contract.⁴⁹² After the plaintiff's counsel had opened his case the referee noted:

Were goods in accordance with contract?

This dispute concerned the quality of 57,000 printed colour soap cartons. The cartons as delivered did not correspond with the sample previously inspected by the defendant, who refused to accept part of the delivery. 5,000 to 10,000 cartons were inspected on delivery. The printer's consultant found that the cartons were of varying shades of green. In evidence he said:

I don't think any lady buying soap would notice it.

When cross-examined:

I have not had experience of this particular brand in recent years.
I have had no experience in carton printing.
I have had no practical experience.

Following evidence there must have been some discussion in court of eight issues two of which were withdrawn by the plaintiff's counsel as Eastham noted:

Issues

1. What was the contract between the parties? (agreed)
2. If the contract was a sale by sample was the bulk in accordance with the sample. (agreed)
3. Was the 16th April 1950 delivery merchantable in
 - a. colour and
 - b. printing (agreed)
4. Did the 16th April 1950 delivery comprise merchantable and unmerchantable cartons (agreed)
5. If the 16th April 1950 delivery was in accordance with contract what damages have plaintiffs suffered?

Agreed main issues 2 and 3 as opened by plaintiff's counsel-abandoned.

6. Was there ever a final binding contract as to the Mary Drake cartons?
7. If so, was it repudiated or if so by whom or was it cancelled by the parties.
8. If the plaintiffs repudiated what damages have the defendants suffered? £355

All agreed.

Illustrating case management in the course of trial at its best Eastham then narrowed the case further by getting counsel to agree that there were two essential questions as he again noted:

Difference between parties: was there a sale by sample as to colour?
Not disputed there are different shades of green.

⁴⁹² J.114/19 [HPIM 1125] 10 July 1951.

He then noted:

No evidence of any damage at all.
Plaintiffs did say they were of no value.

This case demonstrates the utility of the preliminary issue device in narrowing the matters in dispute and getting to the core of the case in the course of trial without untoward delay in dealing with the whole history of the dispute.

Davidson Engineers v Stephens & Brotherton Ltd was heard on the 19 July 1951 and involved conversion of goods.⁴⁹³

Here Eastham was asked to answer two primary and two subsidiary questions:

1. Was it conversion?
2. If it was conversion what is the proper date for assessment of damages?

If reduced to a claim for breach of contract

1. Was there a market in which the plfs could have bought the goods the def (*sic*) [The note should have read: *Was there a market in which the defendants could have sold the goods*] (Submits there was market)
2. If no market- entitled to damages (special) sellers knew what plaintiffs were going to do with goods. (1949) 2 KB 528 p.539.⁴⁹⁴

The action concerned the sale of two million yards of wire (weighing 250 tons) encased in polydeanolchloride⁴⁹⁵ (*sic*) (PVC) where the buyers were breaking down the cable and selling the plastic and the wire as separate items.

Eastham was asked two further subsidiary questions:

1. What would be fetched for PVC strippings?
2. What would it fetch if sold in the ordinary market?

He noted:

Limited to date of breach for damages
For the wire there was a market

Repudiation acceptance of repudiation by defendants.
On plaintiff's figures I have to deduct £150 for Commission Transport agreed.

There is no doubt that by analysing the legal issues in this way the trial time was curtailed and expense saved.

*Knibbs v Goodhale Engineers Ltd*⁴⁹⁶ was heard on the 8 July 1952. This was a building contract matter involving the following preliminary questions:

1. Was it a an entire contract ?
If so what is fair and reasonable for work done?
2. If entire contract what is fair and reasonable charge for the admitted extras ordered by the defendants?

⁴⁹³ J.114/19 [HPIM 1141]

⁴⁹⁴ *Victoria Laundry v Newman* 12 April 1949.

⁴⁹⁵ Polyvinylchloride is the chemical name of PVC.

⁴⁹⁶ J.114/19 [HPIM 1177]

3. Is the Plaintiff was entitled to £30?
4. If entire contract and contract broken, what damages?
5. Was water pipe installed on defendant's express orders?

Eastham gave the plaintiff judgment for £107 with costs to be taxed.

In *Wilson v Eastern Counties Farmers Cooperative Association Ltd* a farmer (Plaintiff) wanted dual purpose potatoes and was told that Ulster Ensign Potatoes were such potatoes.⁴⁹⁷ He obtained the seeds. He selected these potatoes because they had been described as suitable for their requirements. The case was tried before Eastham on the 17 March 1953. An expert gave evidence as to a high incidence of blight and infection in the seeds.

Eastham heard preliminary issues as to the fitness for purpose of goods under section 14(2) of the Sale of Goods Act 1893. The judge noted the following issues:

1. Were potatoes fit for the sold purpose?
2. Were potatoes infected by blight at time of delivery?
3. If not were they so satisfactory;
4. If not were they blighted as to be unsuitable for the purpose for which the potatoes were required.
5. Was the damage due to Plaintiff's action or conduct as alleged?

In *P.C.S. Ltd v Lewer* heard in early February 1954 Eastham noted Preliminary Issues as follows:⁴⁹⁸

- 1st Issue- What is the contract.
 Pltfs say NH/PC/1.....
 Plus a brief specification
Defs say: no price fixed
 So reasonable remuneration for work done.

Butler v Vaughan heard on the 30th July 1957 was a matter of an account tried on preliminary issues. Edmund Davies QC submitted that there were three questions for the judge to decide.⁴⁹⁹

1. Was there any agreement as to remuneration?
2. What is fair remuneration?
3. What services were provided?

Another example is found in Carter's Minute Book on the first day of the trial of *Middleton v Blackwell*⁵⁰⁰ at the Cheltenham County Court in Gloucester. Graeme

⁴⁹⁷ J.114/28 [SH 101376]

⁴⁹⁸ J.114/31. [SH 101190]

⁴⁹⁹ J.114/35 [HPIM 2780]

⁵⁰⁰ J.116/3 [CIMG 0096] 16 June 1965.

Hamilton opened the case for the defence submitting that the questions for the judge were:

1. whether drain was in a first class condition
2. whether the Plaintiff's agent was acting with authority and
3. whether the agent made a representation that was fraudulent or amounted to a collateral warranty.

At the end of the plaintiff's case⁵⁰¹ Carter immediately decided the first issue as to whether the representation "I guarantee drain in first class condition" was not made by the agent. There was an inherent unlikelihood in his view that the agent would say any such thing. To suggest this was "the power of wishful thinking" and of "people convincing themselves that they received assurance they never did."

Whilst counsel appear to crystallise the issues here regrettably the judge's note lacks coherent reasoning; his note jumps to a conclusion after the opening but this maybe because in court he had insufficient time to note it before immediately summing up.

In *McConnell v Grant*⁵⁰² heard on the 23 October 1957 the preliminary issues concerned a claim for remuneration as the deputy referee noted:

1. Was there any agreement as to remuneration?
2. Was it fair remuneration?
3. What services were included?

*George v Russell Bros (Paddington) Ltd*⁵⁰³ provides further evidence of this device in the form of an order of the deputy referee who tried preliminary issues as ordered to the effect:

that issues of fact as to amount of Plaintiff's loss and expense in completing the house himself and the amount of the sum claimed by the Defendant under the contract or on a quantum merit basis be tried after the other issues in this action.

This indicates that these issues were defined after a hearing in court and that they were formulated after debate between counsel and discussion with the judge. It is also the first reference noted to "loss and expense," the quantity surveyor's nomenclature for damages.

On 23 July 1951 Eastham heard *T J Kendel & Co v ATA Scientific Progress Ltd*.⁵⁰⁴ There were a number of issues in this case which was basically a claim for £168.5s.1p on an alleged costs plus type contract and work on the roof. The preliminary issues were:

⁵⁰¹ J.116/3 [CIMG. 0097]

⁵⁰² J.114/35 [HPIM 2780]

⁵⁰³ J.114/35 [HPIM 2800]

⁵⁰⁴ J.114/16 [HPIM 2186]

1. Was it costs plus contract or was it lump sum contract?
2. If costs plus was the work properly carried out?
3. If so, how much?

By agreement of the parties the referee's jurisdiction was extended to include a further issue as to the existence and substance of an oral contract.

The referee noted:

By consent I try the issue what was the oral contract?

A number of cases involving determinations of preliminary issues are noted in the *Official Referee's Court Minute Book No.4*, the time record of Carter's court in the 1959-62 period include: *Martin French v Kingswood Hill Ltd*⁵⁰⁵ concerning preliminary issues as to whether a payment into Court constituted discontinuance of action, and whether a cause of action survived discontinuance; *Engineering Co Ltd v Parkwood Carlington Engineering Ltd*⁵⁰⁶ heard on the 26 November 1961 as to whether a fixed price was agreed; *A.T. Chown & Co Ltd v Peter Davis Investments Limited*⁵⁰⁷ heard on the 5 July 1962; *Edward Vernon Andrews v (Greens (Wholesale China))* heard on the 11 July 1960 which concerned matters of account; *Lenton v City of Coventry*⁵⁰⁸ a building claim heard on the 1 November 1960; and *Shearing v Wisehill Field Company Ltd*⁵⁰⁹ another Building case heard on a preliminary issue on 5th July 1962.

In *Extol Engineering Ltd v The British Process Mounting Co (a firm) and Andrews Houseware Manufacturers Ltd*⁵¹⁰ heard on the 29 March 1965, the issues considered involved the manufacture of engineering parts not conforming to prototype. Preliminary Issues stated were: what was contract? Did items correspond with sample? Were they fit for purpose? Are they entitled to refuse to take delivery of balance?

Another example of this device was *Frederick William Young v Charles William Connerly*⁵¹¹ which Carter heard on the 25 March 1965. This building case concerned typical building contract issues as to: what was the contract and what was a reasonable price for extra works.⁵¹²

⁵⁰⁵ J.116/1 [HPIM 1964] and J.114/34 [SH 101355]

⁵⁰⁶ J.116/1 [HPIM 2072]

⁵⁰⁷ J.116/1 [HPIM 2116]

⁵⁰⁸ J.116/1 [HPIM 2030]

⁵⁰⁹ J.116/1 [HPIM 2113]

⁵¹⁰ J.116/2 [SH101784] and see J.114/45 [CIMG 0736]

⁵¹¹ J.116/3 [SH101015]

⁵¹² J.114/47 [SH101975]

This was followed on the 8 February 1966 by *United Dominions Trust (Commercial) Ltd v Thomas Gravell & Prized Steele Garage Ltd* a commercial matter as to whether a legal instrument was a contract of guarantee or one of indemnity.⁵¹³

Further example of the device are to be found in: *K. Cross (Doncaster) Ltd v County Council of York (East Riding)*⁵¹⁴ heard on the 10 October 1966 as to Architect's duties and provisional sums for the works described in the contract; *Olga Hilditch (Widow) v Charles E.H. Durham and A E L Durham (Married Woman)*⁵¹⁵ heard on the 24 February 1967 as to the extent of a landlord's obligation to repair; and *Swallow Prams Limited v United Air Coil Limited*⁵¹⁶ heard on the 11 May 1967 on an issue of waiver.

A final example of the utility of preliminary issues as a tool of micro-caseflow management is the leading case of *Gloucestershire County Council v Henry William Richardson (Trading as W.J. Richardson & Son) and Ocean Accident and Guarantee Corporation Limited*.⁵¹⁷ Richards was the referee. The writ was issued on 14 December 1962 but the action was not referred to the referee until 19 March 1964, a lapse of 15 months. This was an action for damages for incomplete works. The contractor's defence alleged numerous failures by the architect to give proper instructions for the works which resulted in the contractor's solicitors giving the plaintiff notice of termination in October 1961.⁵¹⁸ By its counterclaim the contractor pleaded that the architect ought to have extended time in order to enable the contractor to complete works following any variations.⁵¹⁹ In this case there is clear evidence of case management with preliminary issues being identified in the referee's judgment as:

- (a) Whether the First Defendant wrongfully and in breach of Clause 16 of the General Conditions of Contract abandoned the works and thereafter wrongly failed to carry out and complete the works as alleged in paragraph 6 of the Statement of Claim and
- (b) By reason of the matters alleged in paragraphs 3, 4 and 5 of the Amended Defence and Counterclaim the First Defendant was entitled to determine and by Solicitors letter dated 8 November 1961 to the Plaintiffs did determine his employment as contractor under the said contract as alleged in paragraph 6 of the Amended Defence and Counterclaim.

⁵¹³ J.116/3 p.99 [SH101055]

⁵¹⁴ J.116/3 p.172 [SH101085]

⁵¹⁵ J. 116/4p.19 [SH101810]

⁵¹⁶ J. 116/4 p.35 [SH101818]

⁵¹⁷ J.115/28 [HPIM 2733]

⁵¹⁸ J.115/28 [HPIM 2737]

⁵¹⁹ J.115/28 [HPIM 2738]

Richards ordered:

Judgment for the Plaintiffs against the Defendant Henry William Richardson on the issues with costs thereon limited to the sum of £50.

And it is further Ordered that the costs of the Defendant Henry William Richardson be taxed in accordance with the provisions of the Third Schedule of the Legal Aid and Advice Act 1949.

DATED the 28th day of July 1966.

N.R.⁵²⁰

Whilst this case took 6 years to resolve, three years of which was taken to resolve costs issues we could hardly suggest that this was cost/time effective. On the other hand, the costs awarded served as a punitive warning to other litigants.

Apart from this case, numerous examples have been given of preliminary issues. In some cases they were adopted by agreement of the parties, in others after discussion with the referee, or emerged in the course of trial. In most cases they appear to have defined the key issues and differences between the parties. Very often determination of such questions resolved the case or a substantial part leaving minor matters to be agreed between the parties saving time and costs in court.

Some cases provide examples of an activist approach such as *Pepper & Co Ltd v Harry Green Ltd*⁵²¹ where Eastham gradually narrowed the issues, most of the cases represent a more passive approach to the device epitomised by *Jack Hyman Sockel v Issacc Francis Salmon Matthew Francis*⁵²² and *George Osborne Limited v E C Goddard (Male)*.⁵²³

We find both from this research and from the quantitative analysis this practice was the most popular caseflow management device.⁵²⁴

4.3.7 Geographic and economic location for the parties

After the war we find a number of examples of referees sitting at provincial locations. Such sittings saved the parties the time and expense of coming to London. They also facilitated inspection of the site by the referee.

In *Pralls Motors Ltd v Hiles Bros & Mussele* heard on the 3 March 1953 Eastham sat at the Crown Court in Hereford. In *Wilson v Eastern Counties Farmers Cooperative Association Ltd*⁵²⁵ the court was convened at Ipswich. Others included: *Hogg v*

⁵²⁰ J.115/28[HPIM2742]

⁵²¹ J.114/19 [HPIM 1125]

⁵²² J.114/15 [CIMG 0466]

⁵²³ J.114/14 [CIMG 0086]

⁵²⁴ See Table T.5.35.

⁵²⁵ Cited above at paragraph 4.3.6

*Barnand*⁵²⁶ heard on Monday 21 November 1955 Percy Lamb QC at Warwick; the trial of *Middleton v Blackwell*⁵²⁷ at the Cheltenham County Court in Gloucester, the leading case of *Moresq Cleaners Limited v Hicks*⁵²⁸ which was heard by Carter sitting at Truro Town Hall on Tuesday 5 July 1966, the case of *Harper and Preston Limited v Marshall Castings Limited*⁵²⁹ which was heard in Birmingham on the 22 February 1961; *Barrow Brothers (Builders Lancaster) Limited v Haworth* heard at the Lancaster District Registry on the 3 December 1962,⁵³⁰ and *United Dominions Trust (Commercial) Ltd v Thomas Gravell & Prized Steele Garage Ltd*⁵³¹ heard by Carter at the Crown Court, Guildhall, Swansea on the 8 February 1966.

4.4 Other aspects of rudimentary caseload management

After the war a number of rule changes were made following the recommendations of the *Evershed Report*.⁵³²

4.4.1 Early directions hearings

Order 36 Rule 47 AB⁵³³ provided that a party could apply to the court for directions from the referee within 14 days of the case being referred to the referee. This effectively expedited the directions and gave the referee an early opportunity of finding out what the case was about and giving directions as to appropriate to the issues. The *Annual Practice* for 1955 contained *Notes on Practice for Referees*⁵³⁴ confirming the position:

Applications for directions must be made within 14 days of entry (see r. 47AB). Interlocutory proceedings are conducted by the referee in his Chambers, including issuing of summonses, the drawing up and sealing of orders and the filing of documents. Summonses and applications are heard at 10.30 a.m.The trial is conducted as before a High Court Judge without a jury.

Here the rules confirm the dual jurisdiction of the referee conducting interlocutory hearings in chambers like a master and trials like a High Court judge.⁵³⁵ This is

⁵²⁶ J.114/35. p. 33 [HPIM 2766]

⁵²⁷ J.116/3 [CIMG. 0096]

⁵²⁸ J.116/3 [CIMG. 0110]

⁵²⁹ J.116/1. [CIMG184]

⁵³⁰ J.116/1 p. 296.[CIMG200]

⁵³¹ J.116/3 p.99 [SH101055]

⁵³² n. 22.

⁵³³ Added by RSC (*Summons for Directions etc*) 1954. Cited in *Annual Practice 1955* p.624.

⁵³⁴ *Annual Practice 1955* pp. 632 and 633.

⁵³⁵ The *Rules of the Supreme Court 1873* contained two rules: 34 (Proceedings before an Official Referee) and 35 (Effect of the Decision of the Referee). In 1875 the rules were expanded to five rules (29A-34). In the *Annual Practice 1955* there were thirteen rules: Order 36 rr. 45-58 with *Notes on the Practice* pp. 623-633; and following changes implementing Evershed under Section 15 Administration of Justice Act 1956 the number was reduced to eight (Order 36 rr.1-8.)

significant because it meant that the case could be managed more quickly without undue delay between the referral and the directions hearing.

It was at the first directions hearing that Newbolt had actively encouraged settlement, as he wrote: ⁵³⁶

...there is no greater check on wasteful expenditure than the arrangement by which the trial judge takes his own summonses, especially if he makes notes of them upon the file.....The mere discussions across a table, which costs nothing in comparison with the cost per minute in Court, discloses what issue it is that the parties wish to try, and eliminates the very source of the litigants grievances..

4.4.2 Inter-referee transfers

Another expedient that facilitated caseflow management was R.S.C (No.3) 1949 which provided that any referee could transfer any business from himself to another referee with that other’s consent. If the case was transferred to a named referee then all parties to the litigation would have to consent to the reference. This change was brought about by the earlier recommendations of the Evershed Committee. Prior to that amendment, Order 36 Rule 46 of the *Rules of the Supreme Court 1883* had simply provided that referrals were to a referee in rotation. This meant that if a particular referee had a lengthy case he might accumulate a backlog without his list being reallocated. This amendment should have reduced the backlog as referees would have been able to reallocate their cases.

The immediate coincidence of this macro-tool was an increase in the number of cases tried. Taking the years 1949-54 we find the trend increasing by 73 per cent from 225 trials to 307 trials with the number peaking at 350 trials in 1952.

Table T.4.1 Numbers of trials 1949-54

Year	1949	1950	1951	1952	1953	1954
Trials	225	289	293	350	316	307

Source: Civil Judicial Statistics 1949-54

4.4.3 Enquiry and report

Following the Evershed Report, the referee provisions of the Supreme Court of Judicature Act 1873, Arbitration Act 1889 and Sections 86-97 Supreme Court of Judicature Act 1925 were replaced and Order 36 *Rules of the Supreme Court* was redrafted in accordance with Section 15 Administration of Justice Act 1956. In respect of cases of a highly technical nature the latter was intended to provide according to the *Second Interim Report of the Committee on Supreme Court Practice and Procedure*,⁵³⁷

⁵³⁶ n.2 pp. 437-8

⁵³⁷ 1950-51 (xvi) Cmd. 8176

detailed recommendations for rewriting the procedural code for referees. It did not implement what Eastham and Newbolt had advocated although the objective of the *Interim Report of the Committee on Supreme Court Practice and Procedure*⁵³⁸ was:

....to consider what reforms.....should now be introduced.....for the purposes of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business.

Newbolt would have supported this objective but would have been disappointed at the marginal measure of reform because *Rules of the Supreme Court (No.1) 1957* retained the enquiry and report jurisdiction⁵³⁹ contrary to the earlier suggestions in Burrows' article and contrary to suggestions made by the referees that Section 88 Judicature Act 1925 should no longer apply. The referees submitted that the process was expensive but the Evershed Committee saw advantage to litigants in retaining it.⁵⁴⁰ The Committee supported the referees' suggestion of widening the discretionary power to refer cases to a referee under Section 89 of that Act. The Committee's report was published in March 1951 and whether fortuitously or not referrals increased to 724 cases in that year. This figure was not surpassed until 1970 with 901 referrals. Referrals for 1950-52 were: 1950: 677; 1951: 724; 1952: 730. The figures however declined thereafter to 633 referrals in 1953 and fell sharply again in 1957 to 449.⁵⁴¹ This is further illustrated in Chart C.6.1.

Whilst the referees may not have wanted the inquiry cases such investigations did save High Court judge time although to have referees enquiring into questions of damages for loss of use of an ice-cream vending machine may seem trifling for an officer of the Supreme Court vested with High Court judge power.⁵⁴² Evershed considered that the advantage to the litigant outweighed the cost anxiety of the referees in such cases so that there is evidence of a continuum of the subordinate judicial role of the referee acting as a jury in making assessments of damages as in cases such as *Frederick Baden Powell Weil v John Southern*⁵⁴³ and *Beswarwick v Woodbridge* 12 May 1953.⁵⁴⁴

⁵³⁸ Terms of reference (1)

⁵³⁹ RSC1957 Ord.36A, r.1, and r.2.

⁵⁴⁰ 1950-51 (xvi) Cmd. 8176 p.40 para 109.

⁵⁴¹ n.238

⁵⁴² J.114/17 p. 236 [SH 101143] *Rutter v Dean*. Referred by Mr Justice Stable to O.R. Hearing 26 April 1951.

⁵⁴³ J.114/17 p. 190 [SH 101134]

⁵⁴⁴ J.114/28 p. 92 [SH 101389]

4.4.4. Necessity for caseload management

At macro-level the view after the war was that the referees fulfilled a useful subordinate function and that there was no reason to change their status or form a specialist Division of the High Court for them.⁵⁴⁵ There was therefore little change at macro-level, save a wider discretion for High Court judges to refer matters. At micro-level the inter referee transfer system should have reduced the increasing individual workload. In my research of Eastham's notebooks for the earlier post-war period 1944-49 I found a variety of cases including war damage claims, smaller commercial cases and matters for enquiry and report which would not be matters tried by a High Court judge. It was not a perfect system and the inexperience of some referees concerned Eastham and Lord Simonds, the Lord Chancellor. This led to a meeting at the Lord Chancellor's office on the 15 January 1952 when Eastham met Sir Albert Napier, the Permanent Secretary, to discuss difficulties over the backlog of cases that had built up with Hubert Hull and John Caswell.⁵⁴⁶ A Note on the Lord Chancellor's file states:⁵⁴⁷

Note

He handed me a letter to Napier enclosing a report on the current lists before the Official Referees. The list for Court No. 4-Caswell, K.C.- is substantially in arrears. Eastham said that this was due mainly to the fact that the appointments of Hull and Caswell had succeeded each other rather quickly and that neither of them had gained sufficient experience during their tenure of office to dispose of the lists expeditiously. He [Eastham] was anxious for me to write him a letter, on behalf of the Lord Chancellor, acknowledging receipt of the lists and drawing attention to the desirability of reducing the arrears in Court No. 4. We discussed the terms of the letter, and I wrote to him today accordingly.

....

15th January 1952

G.P.C.⁵⁴⁸

Eastham suggested that his period of office be extended and continue as the "captain of the team" in the light of his colleagues' inexperience stressing that the public interest could be best served in this way.⁵⁴⁹ It seems that Hull and Cresswell were unfamiliar with the mechanics of the "Scheme" and had not mastered a more efficient means of disposing of their lists. This Note tends to suggest that without micro case-management they could not complete their lists so quickly and that its usage was of assistance.

⁵⁴⁵ 1950-51 (xvi) Cmd. 8176 p.39 para 105

⁵⁴⁶ Sir Herbert Hull Official Referee 1949-1950 succeeded by J.D. Caswell 1951-1959

⁵⁴⁷ LCO 2/7739.[HPIM 0810] *Official Referee Title :Suggestions for Alteration*. 1951-1960.

⁵⁴⁸ Sir George Coldstream.K.C. Assistant Secretary

⁵⁴⁹ Attendance upon Eastham, note by George Coldstream. In the meeting salary scales were discussed and Claude Schuster's support for the referee's increase was endorsed on the note. This discussion was based on the article by Roland Burrows. Cited in n.15 at pp 504-513.

4.4.5. Preliminary assessment of the “Scheme”

Having analysed the instances of rudimentary caseload management in the pre and post-war eras it is useful for us to make a preliminary survey of the court’s overall effectiveness before and after the war. This survey covers the Pollock court between 1920 and 1927 as illustrated in Tables T.4.2-T 4.3⁵⁵⁰ and the Newbolt court 1928-36 illustrated in table T.4.4. What is significant in the context of the hypothesis is the marked effect the “Scheme” may have had between 1921 and 1929. Comparing Tables T.4.3 and T.4.4 we find an increase of 22 per cent in the rate of disposals to referrals in those years from 19 per cent in 1921 to 41 per cent in 1929 and 1931.

Table T.4.2. Total referrals and trials

Year	1919	1920	1921	1922	1923	1924	1925	1926	1927
Total references	210	393	649	593	470	376	389	400	389
Tried	86	159	296	291	184	181	168	157	155
Percentage tried	41%	40%	46%	49%	39%	48%	43%	39%	40%

Source: Civil Judicial Statistics 1919-27

Table T.4.3. Total cases withdrawn and disposed of and percentages of same

Year	1919	1920	1921	1922	1923	1924	1925	1926	1927
Withdrawn	44	91	127	118	144	76	105	136	115
or otherwise disposed	21%	23%	19%	20%	31%	20%	27%	34%	30%

Source: Civil Judicial Statistics 1919-27

We also observe that before the war it would appear that Pollock’s court was more efficient in terms of resolving matters at trial.

⁵⁵⁰ Percentage values throughout the text have been rounded up from decimal to whole integers. These figures rounded up from figures in the Civil Judicial Statistics Analysis: Official Referees: 1919-70.

During Newbolt's time as Senior Official Referee, 1928-36, the corresponding figures were:

Table T.4.4. Percentage of trials and disposals

Year	1928	1929	1930	1931	1932	1933	1934	1935	1936
Tried	130	121	105	109	96	102	134	139	179
Percentage of referrals tried	39%	33%	31%	32%	31%	32%	40%	40%	48%
Withdrawn or otherwise disposed	118	148	133	140	107	102	75	86	70
Percentage of referrals withdrawn or otherwise disposed	36%	41%	40%	41%	35%	32%	22%	24%	19%

Source: *Civil Judicial Statistics 1928-36*

Newbolt's court appears more resourceful in encouraging parties to resolve matters before trial thus saving the time and costs of a court hearing. Such a difference in approach may be the dividing line between an activist and a passive approach to case management.

In this study the fundamental question is whether the "Scheme" was efficient. This is tested in chapter 5 in more depth. Here we take an average percentage of disposals and trials:

Table T.4.5. Average percentage of referrals resolved before and at trial

Management stage	1919-27-Pollock	1928-36-Newbolt
Resolved before trial	25%	32%
Resolved at trial	43%	36%

Source: *Tables T 42.-T.44*

K

Having considered Newbolt's era we can give a preliminary indication of the effectiveness of these approaches over the whole research period 1919-38 and 1947-70 by an analysis of *Judicial Statistics*.

We can see from a comparison of the tables below T.4.6 and T.4.7 that generally the period before the war was slightly more efficient in disposing of cases before and at trial whether by earlier settlement or by transfer to another court.

The figures given below in T 4.6 are taken from *Civil Judicial Statistics* and those in T 4.7 are average percentages for the two periods.

Table T.4.6 Referrals, disposals and trials

	1919-38	1947-70	Totals
Referrals	7,683	13,932	21,615
Cases disposed before trial	2,053	4,010	6,063
Trials	3,202	4,360	7,562
Total Percentage of trials and disposals to referrals	68%	60%	

Source: *Civil Judicial Statistics 1919-37 and 1947-70*

Table T.4.7 Apportionments of referrals, disposals and trials

Percentages	1919-38	1947-70
Of disposals to referrals	27%	24%
Of trials to referrals	41%	32%

Source: *Spreadsheet Civil Judicial Statistics Analysis: Official Referees: 1919-70*

Here it has been possible to analyse the *Judicial Statistics* in order to assess the court's overall effectiveness.⁵⁵¹ After the war the number of referrals rose considerably to an average of 581 per year, as opposed to 384 per year before the war.⁵⁵² Taking the years 1947-70 the increase in the percentage of new business and rates of settlement in proportion to cases sent for trial is discernable. Comparing the percentage of cases tried, disposed of, or transferred, to the number of referrals in the period 1947-70 we can see the effectiveness of the referees' skills in disposing of their lists. This equates to:

Table T.4.8 Percentage of cases disposed of and tried to referrals

1947	48%
1948	65%
1949	50%
1950	62%
1951	67%
1952	71%
1953	67%
1954	66%
1955	67%
1956	69%
1957	63%
1958	58%
1959	59%
1960	64%
1961	62%
1962	61%
1963	63%
1964	56%
1965	56%
1966	58%
1967	59%
1968	57%
1969	45%
1970	51%
Average percentile	60%

Source: *Spreadsheet Civil Judicial Statistics Analysis: Official Referees: 1919-70.*

⁵⁵¹ These preliminary findings do not analyse the effect of backlog. This is analysed at paragraph 5.4.2.

⁵⁵² See: Table T 5.9.

More specifically in relation to the hypothesis advanced as to the existence of an early form of micro-caseflow management in the 1920s, and its survival and evolution in the period 1950-70, the following conclusions may be drawn:

4.5 Conclusions as to literature review and qualitative analysis

4.5.1. As to early procedural evaluation

Some evidence of a continuum of Newbolt's "discussions in chambers" has been found as well as recognition that settlement discussions might be more expedient and economic than a trial. Comparing chapters 3 and 4 Newbolt's "Scheme" approach seems more activist than Eastham's form of caseflow management. Eastham granted adjournments or stayed proceedings enabling the parties to settle outside the courtroom rather than lead any discussions in chambers. On the other hand, Carter in *Clifton Shipways Co Limited v Charles Lane*⁵⁵³ and *W J Barrs Limited v Thomas Foulkes*⁵⁵⁴ seems to have adopted the "discussions in chambers" activist approach of Newbolt. We have found evidence here of an activist and a passive judicial approach in the case studies.

Whether they applied an active or a passive form of micro-caseflow management both Eastham and Carter demonstrated a continuation and recognition of Newbolt's "Scheme," the latter being more adventurous and interventionist than the former. Both approaches accommodate the value of Newbolt's "Scheme" and the warnings of Lord Birkenhead as to pressure from the bench. Post-war we have seen referees acting as arbitrators with the consent of the parties and acting as a jury in assessing matters of fact.

4.5.2. As to judicial intervention promoting economy and expedition.

Again there is little evidence here of an interventionist approach save for *Clifton Shipways Co Limited v Charles Lane* where there is some evidence that settlement was discussed in court.⁵⁵⁵ It is not clear from the judge's note whether or not he took part in the discussion unlike *W J Barrs Limited v Thomas Foulkes* where the judge was in control of the expert evidence.⁵⁵⁶ In other cases there is evidence of a passive approach which permits the parties to resolve the matter outside court by the granting of adjournments either on the day of trial or adjourning the summons to a later date. An

⁵⁵³ J.116/1 p.104. [CIMG 0176]

⁵⁵⁴ J116/3 [CIMG. 0102]

⁵⁵⁵ J.116/1 p.104. [CIMG 0176]

⁵⁵⁶ J116/3[CIMG. 0102]

example of this more cautious approach was the *Duke of Bedford's* case.⁵⁵⁷ The referee did not insist on pressing ahead with the trial expending time and money, but gave time for the parties to resolve the matter. This passive form of micro-caseflow management was not all about speed. In procedural terms more time can give the parties' lawyers a better chance to prepare their respective cases properly. It may also avoid or shorten the hearing and the consequential costs by resulting in constructive negotiations.

*Allason & Others v Frankpile Ltd*⁵⁵⁸ raises the question as to whether a site visit in complex technical cases is necessary and whether it would accelerate settlement. These examples suggest that such visits accelerated resolution.

4.5.3. As to experts

(a) Use of single joint expert/court expert

Referees continued to utilise experts in various ways: to agree figures of quantum; to assess the extent of damage and repair; to visit the site and report back to the court. *Leon v Beales* illustrates the utility of the single joint expert in terms of cost and time in resolving the extent of necessary remedial works. *Nathan Bernard v Britz Brothers Limited*, however, illustrates the difficulties that are often not appreciated where experts may be right in certain matters but not in all. The most significant point is the fact that in this case the referee was instrumental in settling the expert's terms of reference through a chambers discussion.

(b) Expert determination

The nearest example here is not one of expert determination, but of an assessor who appears from the judge's note to have provided calculations for the court. There is no repetition of the experiment of the earlier period. Their use in various guises whether as party-experts; court appointed experts or in the singular case of Mr Venn charged by the referee to determine what works were to be carried out under his (court's) supervision. See: *Charlton Decoration Co Ltd v Robert Murray*.⁵⁵⁹ This was remarkable because it in effect amounted to court supervision of the works and is the only instance found of such a unique order. Whilst there is little doubt that experts facilitated settlement their assessments on quantum were not always followed by the referee, for example in *Benoir Hamburges v Winifred Stort*.⁵⁶⁰

⁵⁵⁷ J. 114/3. [CIMG 0045]

⁵⁵⁸ J.114/41 p.263 [Dec 2006 Series; CIMG 0656]

⁵⁵⁹ J.114/16 [HPIM2158]. Paragraph 4.3.3 (b) above.

⁵⁶⁰ J.114/5 [HPIM1232]. Paragraph 4.3.4 above.

(c) *Experts and settlement*

Apart from (a) above no evidence has been discovered save for that noted in the *Suter* case.⁵⁶¹

4.5.4. As to proportionality of costs orders

We have already noted the referees' modern approach to costs. Whilst in some of the early 1940s cases the tendency was to award the costs of the defence to the defendant and costs of the claim to the plaintiff, in the late 1940s and early 1950s there was a leaning towards what we now call: "proportionality." After the war Eastham was making costs orders that would not be out of place in practice today. Such orders seem in advance of their time: costs were set off between the parties as in *Albert Colegate v D Raymark (Married Woman)*,⁵⁶² costs were made payable in stage payments *London and Canterbury Motors (A Firm) v B L Koppen*;⁵⁶³ costs were ordered to be paid on the County court scale as in *Benoir Hamburg v Winifred Stort*.⁵⁶⁴ In *Burtain Ltd v J A Tyler & Sons Ltd*⁵⁶⁵ the costs were ordered to be paid by the plaintiff up to a certain date and thereafter by the defendant. In *H Wheeler (Romford) Ltd v F C Chillingsworth* Eastham made an innovative costs order in that he directed the parties to bear the expenses of the appointment of experts in equal proportions. Each side also bore their own costs.⁵⁶⁶

4.5.5 As to special pleadings

The referees utilised schedules of various types following their invention by Scott in the 1920s. Whilst there were no particular innovations in terms of pleading the utilisation of the surveyor-experts schedule in *Hon. Mrs Courtney Cecil Fem Sol v D Ewell (Spinster)*⁵⁶⁷ was a variation of the Scott Schedule. By the 1970s such orders had evolved into a standard direction for the production of a schedule summarising the issues and evidence in the case.

4.5.6 As to preliminary issues

Preliminary issues readily identified the matters in dispute. This device enabled the parties to focus on the key questions of law and fact that would determine the case. It

⁵⁶¹ J.116/1 [CIMG 0188]

⁵⁶² J.114/6 [PRO II (FR) 082]]

⁵⁶³ J.114/3 [HPIM1195]

⁵⁶⁴ J.114/5 [HPIM1232]

⁵⁶⁵ J.114/24 [CIMG 0571]

⁵⁶⁶ J.114/6 [PROII FR 085] 28 June 1949. Paragraphs:3.8.2, 4.3.4 and 4.3.5. above.

⁵⁶⁷ J.114/4 [HPIM1779]

was the most popular element of the “Scheme.”⁵⁶⁸ They were usually drafted by counsel. In some cases it appears that the question is crystallised in the course of the proceedings following an exchange with the referee. The referees notebooks confirm that this device was used by those counsel who later achieved judicial stature, for example, Lords Scarman and Roskill.

We found many instances of this device saving time and expense, but also an exception in the leading case of *Gloucestershire County Council v Henry William Richardson (Trading as W.J. Richardson & Son) and Ocean Accident and Guarantee Corporation Limited*.⁵⁶⁹ That case went on for a number of years so that it is difficult to argue that preliminary issues of themselves expedite a case.

4.5.7 As to geographic location

A number of cases were tried at more convenient locations which would have saved the parties the expense of travelling to London. Numerous examples are given here which pre-date the Courts Act 1970 after which referees, as Circuit Judges, were appointed to sit in provincial centres.

4.6 Summary

From the above literature review and qualitative analysis we find that Newbolt’s “Scheme” survived the war and that the approach to micro-caseflow management varied as between cases, and as between the approach adopted by the individual referee. Preliminary issues became a key time-cost saving device but they did not always curtail the overall length of the interlocutory proceedings.

However, we may conclude from Table T. 4.6 that pre-war trials and disposals represent 68 per cent of the referrals, compared to 60 per cent after the war. This suggests that the earlier period was the more efficient. This is subject to much closer scrutiny in chapter 5.

We may further conclude that there must have been an advantage to the litigant, as Evershed put it, in having complex factual cases determined by a referee especially matters of enquiry and report and assessment of damages. This undoubtedly saved High Court judge time.

We may also surmise at this stage that it may have been difficult for the referees to be efficient in both trial and interlocutory work at the same time. We see, for example,

⁵⁶⁸ Table T.5.35 below.

⁵⁶⁹ J.115/28 [HPIM 2733]

Pollock's court slightly (7 per cent) more effective at trial work than Newbolt's, and Newbolt's court slightly (again 7 per cent) more effective in disposing of cases before trial than Pollocks. (Table T.5.4)

These are very slim margins, but the telling effect is the 22 per cent increase in disposals from 19 per cent in 1921 to 41 per cent in 1931 and 1933. This suggests something extraordinary is happening and it is submitted here that this was due to the operation of Newbolt's "Scheme."

We also found in the literature review that the "Scheme" was sustained after the war by an increasing and more complex workload. This further answers research questions (c), (d) and (e). This leaves us to consider question (e) which we subject to quantitative analysis and further qualitative analysis in the next chapter. In chapter 5 we see how effective such measures were, and how despite this process, the backlog of cases was never cleared although reduced.

The most significant finding here is that cases were brought to trial from the short non-jury list "within a few weeks after the order of reference."

CHAPTER 5

EFFICIENCY AND ECONOMY IN REFEREE CASEFLOW MANAGEMENT

5.1 Impact of Newbolt's "Scheme"

The methodology of Chapters 3 and 4 was based on a literature review and qualitative analysis of contemporaneous documentary evidence. There we answered questions as to the "Scheme" and its impact and how it facilitated expedition and economy. Both chapters demonstrated the existence of rudimentary caseflow management practised in varying degrees by the referees over the course of five decades.

This chapter presents a quantitative analysis in four sections; Part A describes the caseflow in the court; Part B analyses the expenditure of time; Part C presents direct evidence and analysis of micro-caseflow management and Part D presents the conclusions of this quantitative analysis.

The research question (f) is answered here by assessing the impact of such procedures by qualitative and quantitative analysis of *Judicial Statistics* and original court records, comparing the same as appropriate, and mathematically and statistically measuring the impact of such techniques.⁵⁷⁰ Whilst such an analysis cannot be definitive it can give a range of probabilities and indications as to the likelihood of its existence and effect. This involves, in the absence of evidence to the contrary, the assumption that it was a rudimentary form of caseflow management that made the difference in certain cases. All the figures used in these analyses come from annual *Civil Judicial Statistics* (Table XII).⁵⁷¹

The time analysis has been confined to the years 1959-62 and 1965-67 comprising the earliest surviving records. The earlier period relies on the published works of Sir Francis Newbolt, the Lord Chancellor's Office files and upon *Judicial Statistics*. We conclude with analyses of the actual use of micro caseflow management and its usage before and after the war. This indicates that the utility of micro caseflow management was more efficient than the traditional judicial (non-interventionist) approach especially before the war. On the other hand, it also argues for a contrary hypothesis based on findings and analyses of the backlog of referrals, the low turnover of cases by Walker Carter QC and time spent on trials after the war. The basis of such alternative hypothesis is predicated on the notion that a disproportionate increase in backlog adversely affected the pending

⁵⁷⁰ Research question (f) p. 24

⁵⁷¹ n.51 and Backlog Analysis Spreadsheet 1919-70

caseload so as to diminish the benefit of effective caseload management.⁵⁷²

The fundamental criterion in this analysis is the time taken to resolve the dispute either before or at trial: this is the presumed indicator of efficiency in this thesis.

5.2. Quantitative analysis

This quantitative study presents:

1. An analysis of the personnel and matters referred and resolved by settlement, trial, or otherwise.
2. The application of simple formulae and hypothesis testing mostly by way of average percentage analysis of the Newbolt "Scheme" and its evolution.
3. A comparison and close study from *Judicial Statistics* of the pre and post-war periods, as well as two sub-periods 1959-62 and 1963-65, further testing the existence and possible effect of rudimentary micro-caseload management. Most importantly a comparison is made of the case managed and non-case managed cases to detect time differentials.
4. An identification of the following micro-caseload management elements:
 - 4.1. Early Procedural Evaluation,
 - 4.2. Judicial Intervention,
 - 4.3. Single Joint Experts,
 - 4.4. Expert Determination,
 - 4.5. Experts and Settlement,
 - 4.6. Proportionate Costs Orders,
 - 4.7. Special Pleadings,
 - 4.8. Preliminary Issues,
 - 4.9. Sitting at a convenient locale.

Their utility is analysed in terms of time and compared to other cases where there is no evidence of these elements of case management having been used. Only by quantitative analysis and comparative study is it possible to make some attempt to measure the likely effects of caseload management in this court. In this context caseload management becomes a normative test of efficiency.

As a final exercise it is possible to calculate the time spent on caseload management

⁵⁷² A Rand study on *Statistical Overview of Civil Litigation in the Federal Courts* (Dugworth and Pace, 1990) postulated that if delay became a more serious problem over time, disproportionate increases in the pending caseload could be expected in respect of civil suits in the Federal District Courts 1971-86.

elements from the Minute Books 1959-62 and 1965-67. Using those calculations it is possible to measure a hypothetical application of the Newbolt "Scheme" and its evolution as micro-caseflow management after the war.

It is also possible to calculate the time expended in the conventional traditional English judicial manner and the time expended in cases utilising caseflow management techniques. This final analysis tends to support the hypothesis that rudimentary caseflow management facilitated complex cases in terms of economy and expedition as Newbolt had suggested. A summary of findings is found at Table T.5.35 and T.5.38. This is probably the most critical analysis which tests the effectiveness of Newbolt's Scheme and the hypothesis advanced in this thesis.

These analyses conclude that trial times could be reduced by up to 50 per cent, and supports to an extent Newbolt's opinion that trial times could be reduced by 80 per cent.⁵⁷³ Here we also conclude that a quarter of cases were caseflow managed and that on average up to a quarter of cases were disposed of before trial. The coincidence of the latter findings suggests a link that is corroborated to an extent by the earlier findings in chapters 3 and 4 and in this chapter. Such conclusions may be drawn in the context of other factors beyond the court's control including the experience of counsel and solicitors appearing in the case and the attitude of their clients. This quantitative analysis focuses simply on statistical evidence and calculations, not on those other factors.

⁵⁷³ n.2 p.437 Newbolt considered trial times could be reduced to a fifth of the normal time through use of a court expert..

PART A CASEFLOW

5.3 Data Collection 1: *Judicial Statistics 1919-70*

The statistical data compiled in the Appendix Spreadsheet is extracted from *Judicial Statistics* for this court between 1919-38 and 1947-70.⁵⁷⁴ It gives the numbers of referrals to the referees each year, the cases that were tried, and those that were otherwise disposed of by settlement, strike out or discontinuance. It gives the number of days spent on referee business. It also contains calculations based on formulae for testing the court's efficiency for the purpose of this study.

5.3.1 Testing the hypothesis

In the pre-war era 1919-38 there were 7,683 referrals, whereas in the post-war era 1947-70 there were 13,392 referrals, a 74 per cent increase on the earlier period.⁵⁷⁵

In the pre-war era the average rate of cases withdrawn, settled, tried and otherwise disposed of was 68 per cent, and in the post war period 60 per cent.⁵⁷⁶ Whilst these figures are very close the latter period is the more efficient taking into account a practical trebling of overall caseload from 385 in 1947 to 901 in 1970.

In order to determine the efficiency of this court we can consider the number of cases referred, and the average allocation of cases to each referee tabulated in Table T. 5.1. to obtain a benchmark average. We can also measure the average number of disposals before trial which may be essential to establishing that Newbolt's "Scheme" made the court more efficient.

Here we see:

1. a higher number of disposals before the war than the period 1947-59 following the war, but a doubling of settlements in the decade from 1960 to 1970.
2. a pre-war caseload (1919-38) that was the precise equivalent to the post-war caseload (1947-59) at 7,683 referrals.
3. that the referees in the earlier period disposed of 2,053 cases or 27 per cent of their workload before trial, whereas the referees between 1947 and 1959 disposed of 1,619 cases or 21 per cent.

⁵⁷⁴ n.51

⁵⁷⁵ All percentages are rounded up e.g. 60.5%=61%.

⁵⁷⁶ This is represented here by **Formula A**=

$$\frac{\text{Cases tried (B 13)} + \text{Cases withdrawn or otherwise disposed of (B14)} + \text{Cases transferred (B 15)} \times 100}{\text{Total references for trial (B5)}}$$

4. that in the earlier period there was an average establishment of 3 referees and in the latter 4 referees.

Generally, we may conclude that the referees in the first period were a little more efficient than in the second period which may be due to a number of causes.

Table T.5.1. Referral workload and average efficiency

Year	Average No. of Referees	No. of cases	Average number of referrals per year	Numbers of disposals/settlements before trial	Average number of disposals per referee	Average number of referrals per referee
1919-1931	3	5,244	437	1,495	42	146
1932-1938	2	2,439	348	558	40	174
1947-1959	4	7,683	591	1,619	31	148
1960-1970	3	6,249	568	2,086	63	189

Source: *Civil Judicial Statistics 1919-70*⁵⁷⁷

Having made these observations we can now consider a further analysis looking at the time spent by the referees on their caseloads. The sitting times are taken from the *Civil Judicial Statistics* from 1922 and after as none were available for the years 1919-21.

Table T 5.2. Trial workload and time spent

Year	Establishment	Trials	Average no of trials per year per referee	Sittings/days spent	Time spent per case	Average number of days sat per referee per year
1922-31	3	1,601	53	4,076	9 hrs.	136
1932-38	2	1,060	76	3,087	10hrs.	221
1947-59	4	3,223	62	6,897	7½hrs.	133
1960-70	3	1,137	34	4,280	13hrs.	130

Source: *Civil Judicial Statistics 1919-70*

Note: Time spent per day is calculated from a 3½ hour notional average time.⁵⁷⁸

From Table T. 5.2 it may be seen that:

⁵⁷⁷ Excluding 1938-46 for which no statistics are available.

⁵⁷⁸ Calculated as 3½ hours notional time (Minute Book average) multiplied by day's sat divided by number of trials multiplied by 100.

1. The more efficient trial times were attained in the Eastham and Carter in the 1947-59 period when there were 4 referees in post, the highest number in the pre and post war periods. Their average trial time was 7½ hours. This was followed by the 1922-31 period where the average trial time was 9 hours;
2. The longest average trial time was in the 1960-70 period (13 hours);
3. The highest average number of trial days sat was in 1932-38 when the referees sat on average for 221 days per year;
4. The cases tried in 1932-38 were 66 per cent of the annual number of cases tried in the previous period so that efficiency in that respect was much reduced by reduction in judges available;
5. The number of trial days in 1932-38 is more than double the number of trials in that period;
6. The number of trial days in 1960-70 is almost quadruple the number of trials in that period. This suggests more complex trials. A possible reason for the increasing time spent on trials in the 1932-38 and 1960-70 eras may have been the increasing complexity of these cases;
7. In the pre-war period the referees sat for longer periods than post-war judges;
8. Between 1932 and 1938 only two referees were in post. They came under more pressure to complete trial work. Arguably, because of this pressure, less time may have been devoted to interlocutory work affecting disposal and settlement figures.
9. When Lord Cairns quantified his proposals to the Treasury in 1875 he stated that 4 referees would each work 200 days per year. Over the course of this research period, before and after the war, the highest number of sitting days recorded for 4 referees was in 1952 when they sat for 645 days.⁵⁷⁹

5.3.2. Trial averages

Having considered the relative efficiency of the court before and after the war we can then consider the average trial time per case, and the average number of trials per judge in Table T.5.3.

⁵⁷⁹ LCO 1/73 [HPIM 0457] Para 2.5.5 and n.241 Line 20 AI
160

Table T 5.3 Average trial times and trials per referee

Period	Average trial time	Average number of trials per judge
Before the war	8½ hrs.	129
After the war	10¼ hrs.	96

Source: Tables T5.1 and 2 above

This preliminary analysis suggests a slowdown in the numbers of trials and the time taken which might be due to increasing complexity. This corroborates earlier preliminary findings at Table T.1.7. There we found that the percentage of trials to referrals decreased by 9 per cent on the pre-war figures.⁵⁸⁰ Table T.5.3 supports the hypothesis in respect of efficiency in Newbolt's time. It has already been proved in Chapter 3 that Newbolt was using caseflow management techniques at the material time and it is suggested that it was those techniques that contributed to this efficiency.

5.3.3 Testing the anti-hypothesis

Having considered this statistical analysis we can next consider the inefficiency of referees in terms of annual backlog. Again, this is extracted from *Judicial Statistics* for the same periods as above by reference to the number of referees in post. What is shown displays a common trend demonstrating that the Newbolt era appears the more efficient period as it does throughout the analyses that follow. It is important here to define "backlog" in this context as those cases which in a given year have not been adjudicated or otherwise resolved. Thus, cases pending at the end of a particular year are included in Table T. 5.4 below for that year and not the next year.

The backlog figure at the beginning of the year is not included.⁵⁸¹

Table T. 5.4 Backlog calculations

Year	Numbers. of referees in post	Backlog of referrals	Average backlog of cases per referee	Average backlog as a percentage of referrals per referee ⁵⁸²
1919-1931	3	1,608	45	31%
1932-1938	2	819	59	34%
1947	3	202	67	52%
1948-1956	4	2,013	56	34%
1957-1970	3	3,274	78	43%

Source: *Civil Judicial Statistics 1919-70*

⁵⁸⁰ See Table T.1.7 p.33 above.

⁵⁸¹ This backlog at the beginning of the year is however the subject of further analysis in Chapter 6 paragraph 6.2.4.

⁵⁸² Taken by reference to number of average cases referred to average number of delayed (backlog of cases) i.e. $45/146 \times 100 = 30.8\%$

What we find interesting here is that in the pre-war era the backlog is approximately a third of annual referrals with less manpower resource than in the post war period.

We can find the average percentage of backlog to referrals⁵⁸³ by the formula:

$$\text{Spreadsheet ; Line 16 V +16 BB (backlog) / 5 V+ 5 BB (referrals) =}$$

Pre-war	$\frac{2,427}{7,683} = 32\%$	Post-war	$\frac{5,489}{13,932} = 39\%$
---------	------------------------------	----------	-------------------------------

5.3.4. Key to caseload management: early resolution

The further formulae analyses convey the same impression. Whilst this may be due to the competence of the judge and the lawyers instructed, the above tables indicate that management is the key and the key to management is early settlement or resolution. Parties could settle because they realised they had the wrong judge for their case (negative incentive) or the judge encouraged them to settle (positive incentive).⁵⁸⁴ If the hypothesis is right that micro-caseload management improved efficiency, and that is the indication we have from Chapters 3 and 4, then we may ask why it is that in the period 1960-70 the backlog increased from 159 cases in 1960, to 446 in 1970, when by reputation one of the most efficient referees, Sir Norman Richards QC, was in post.⁵⁸⁵ The earlier explanation that it was due to increasingly complex trials may well provide an answer, as might also the invention of the photocopier and voluminous disclosure notorious in building cases. It may simply be explicable by the fact that Richards faced an alarming increase in referrals at that time; an increase from 440 cases in 1960 to 901 in 1970 representing an increased workload of 128 per cent on the 1960 figures, or an increase of 134 per cent based on average caseload in Newbolt's time of 385 cases per year.

5.4. Statistical conclusions and formulaic analysis 1919-38 and 1947-67

The object of this examination is to attempt an assessment of the efficiency of the court by the application of formulae and further statistical and quantitative analysis. We have already noted a varied subordinate jurisdiction principally composed of the non-jury list

⁵⁸³ n..238

⁵⁸⁴ The author received anecdotal evidence that when Richards was a referee he would hear counsel and intervene considerably to get to the issue. He would sometimes adjourn and ask the parties to consider settlement or agree issues. Sometimes he put a limit to the time he would sit to encourage the parties. (Meeting London C.I.Arb 29th March 2007)

⁵⁸⁵ In post 1963-1978. Commended by Lord Salmon *The Times* January 17th 1978 Issue 60212; col. E for having "a distaste for the modern tendency of wasting much time and money in probing the irrelevant".

cases transferred from the Queen's Bench Division after the First World War. These included complex and technical matters of account and report, building and dilapidations cases and some commercial matters.

This assessment is made by reference to the numbers of referrals, trials, settlements and backlog. This is followed by a more detailed analysis of the annual statistics illustrated by line charts plotting fluctuations and trends from which it is possible to make certain conclusions and assumptions as to the impact or otherwise of this rudimentary form of micro caseflow management.

This is followed by a concluding comparative analysis and some preliminary conclusions based on an examination of *Judicial Statistics*.

5.4.1 Testing efficiency by averages- "For hypothesis"

Efficiency is defined as production with minimum waste or effort.⁵⁸⁶ In terms of the referees it may be considered as the disposal of business with the minimum of time and cost without compromising the quality and justice of the decision. For the purposes of justice and quality of decision we must regard that as a constant factor. For our purposes of measurement here, the variable is time, and for this purpose time is the benchmark of judicial efficiency.

Chapters 3 and 4 have proved the existence of rudimentary caseflow management and described various manifestations of it as well as attempting a preliminary assessment. The data collection in the Appendix also demonstrates the comparative time taken in various types of case where caseflow management is used and cases where it is not used. Such savings are demonstrated in Table T.5.38 below.

The primary purpose of the following examinations is to test the hypothesis and ascertain rates of caseflow management as defined by numbers of referrals, and the proportion of trials, settlements and disposals as well as backlog. The given hypothesis is that the invention and evolution of micro caseflow management and interlocutory consensual process made referees more effective and efficient judges for their particular work.

It has already been argued that Newbolt's "Scheme" was evidence of that phenomenon. Here we test that argument by further quantitative analysis. The basis of that argument is that rudimentary micro caseflow management such as Newbolt and his successors and colleagues practised saved time and costs. It also permitted them to do more work.

⁵⁸⁶ *Concise Oxford English Dictionary*.

Thus, his successors could offer their services as Commissioners in the 1950s. We can therefore further illustrate the hypothesis by demonstrating the quicker disposal of cases by earlier settlement or resolution, and by seeing that more cases could be dealt with by a lesser establishment. The hypothesis can therefore be proved from such examination. Where the time is saved it follows that there is likely to be a consequential cost saving. The corollary of the hypothesis contends that where caseflow management was not used cases took more time and were not conducted so efficiently. We later analyse this in Table T.5.38. In that context the hypothesis may also be proved where the average time taken for non-managed cases exceeds that of case managed cases.

For present purposes we may test the hypothesis as follows:

Test 1

If the hypothesis were correct then we should be able to demonstrate that the referees were more efficient when they used such techniques. We can test this by investigating whether the numbers of trials, and disposals were above average and whether at the same time the backlog was reduced in a given period. This would be evidence that the “Scheme” had an impact.

i. *Disposals before trial*

If our hypothesis is right then we would expect a higher than average number of cases to be settled before trial. We can test this proposition by calculating the average number of disposals in the given periods (pre-war and post-war) and hypothesise that where the numbers exceed the average that may be indicative of a more efficient approach.

Taking the number of disposals⁵⁸⁷ from Line 14 of the Spreadsheet⁵⁸⁸ we can calculate the average disposal rate as:

Pre-war:		Post-war
<u>2048</u>	= 102	<u>3335</u> = 139
20		24

Looking at the number of disposals in the pre-war period 1919-38 we find that the rate of disposals were higher than average (102) in the years 1921-23 and 1925-33. We know from chapter 3 that Newbolt practised his “Scheme” at that time.

⁵⁸⁷ This excludes transfers. Transfers are included in the figures tested in Table T.5.7 subsequently.

⁵⁸⁸ n. 51

If we then look at the number of disposals in the post-war period 1947-70 we find that the rate of disposals were higher than average (139) in the year 1950 and in the years 1963-70. Richards had a reputation as an “activist” and he was probably responsible for this higher rate.

We may therefore suggest that these higher than average disposals rates were an indication of a more efficient process and some evidence of effectiveness of the “Scheme.”

ii. *Trials*

Again, if our hypothesis is right then we would expect a higher than average number of cases to be tried when caseflow management was used. We can also test this proposition by calculating the average number of trials in the given periods (pre-war and post-war) and hypothesise that where the numbers exceed the average that may be indicative of a more efficient approach.

Taking the number of trials from Line 13 of the *Judicial Statistics Spreadsheet* we find can calculate the average disposal rate as:

Pre-war:		Post-war	
<u>3202</u>	= 160	<u>4360</u>	= 182
20		24	

Looking at the number of disposals in the pre-war period 1919-38 we find that the rate of trials were higher than average (160) in the years 1921-25 and 1936-38. We know from chapter 3 that Newbolt practised his “Scheme” until his retirement in 1936.

If we then look at the number of trials in the post-war period 1947-70 we find that the rate of trials were higher than average (182) in the years 1949-57. We know from chapter 4 that Eastham also practised a form of caseflow management.

We may therefore suggest that these higher than average trial rates were a further indication of a more efficient process in Newbolt’s time and for a time after the war.

iii. *Backlog*

Again, if our hypothesis is right then we would expect a lower than average backlog of cases when caseflow management was used. We can also test this proposition by calculating the average backlog in the given periods (pre-war and

post-war) and hypothesise that where the backlog is lower than average that may also be indicative of a more efficient approach.

Taking the backlog from Line 16 of the *Judicial Statistics Spreadsheet* we find can calculate the average disposal rate as:

Pre-war:	Post-war
$\frac{2427}{20} = 121$	$\frac{5489}{24} = 229$

Looking at the backlog in the pre-war period 1919-38 we find that the backlog was below average (121) in the years 1919, 1924-33 and 1937-39. This supports the first calculation (i) regarding Newbolt’s time for the mid pre-war period.

If we then look at the backlog in the post-war period 1947-70 we find that it was below average backlog (229) in the years 1947-48, 1950, and 1952-64. The figure for 1950 supports the finding at (i) above and partly (ii) and (iii).

The evidence here supports the Newbolt era as the more efficient in terms of a form of caseload management.

Our general conclusion here is that whilst there is some evidence of the impact of what Newbolt described the evidence post-war is more incongruent.

Test 2

(a) Referrals and trials

We can compare the numbers of referrals (which includes the backlog of cases at the end of the previous year) trials, settlements and disposals over the whole research period by reference to Tables T. 5.5-5.8:

Table T.5.5 Referrals

Period	Referrals	Average number of referrals per year	Average number of referrals per referee per year
1919-38	7,683	384	128
1947-70	13,937	581	194
1959-62	1,753	439	146
1965-67	1,780	593	198

Source; Judicial Statistics 1919-38 and 1947-70

Table T.5.6 Trials

Period	Trials	Average number of trials per year	Average number of trials per referee per year
1919-38	3,202	160	53
1947-70	4,360	182	61
1959-62	621	155	52
1965-67	258	86	29

Source: Civil Judicial Statistics 1919-38 and 1947-70

If we compare the number of referrals with trials, settlements, and disposals we can ascertain the percentage of cases so resolved by:

1. Taking the period 1919-38, given 7,683 referrals (of which 3,202 cases were tried) we obtain a figure of **42%**. [Tables T. 5.5. and T. 5.6.]
2. If we take the period 1947-70 we find 13,932 referrals of which 4,360 cases were tried or **31%**. [Tables T 5.5. and T. 5.6.]

We are not comparing like with like as occurs at Table T.5.11. But, if we compare the average number of trials dealt with by each referee per year we find that before the war each referee dealt with 53 trials a year, and after the war 61. This equates to a **15 per cent** rise in judicial efficiency. In terms therefore of trial rates the referees in the period 1947-70 were more efficient.

(b) Disposals before trial

In terms of early procedural evaluation, informal resolution or referee intervention promoting and accelerating resolution and settlement of the action we can see from Table T. 5.7 that before the war the average disposal rating was 34 cases per year per referee. Before the war the average settlement rate was 27 per cent⁵⁸⁹ and after the war 1947-70 it was 24 per cent. In the period of Newbolt's term in office 1920-36 the rate of settlement was 29 per cent;⁵⁹⁰ 2 per cent in excess of the average per-war rate and 5 per cent in excess of the post-war rate. In the context of Newbolt's "Scheme" chapter 3 proved the hypothesis as to the "Scheme's" existence and this analysis suggests that it made referees more effective and efficient.

⁵⁸⁹ n.51 Line 39 Percentage of cases settled or disposed of. Also see Table T.1.7.

⁵⁹⁰ n.51 Line 39 for years 1920-36 only.

Table T.5.7 Settlements, disposals and transfers

Period	Settlements, disposals and transfers	Average number of settlements, disposals and transfers per year	Average number of settlements, disposals and transfers per referee per year
1919-38	2,053	103	34
1947-70	4,010	167	56
1959-62	354	118	39
1965-67	490	163	54

Source: Civil Judicial Statistics 1919-38 and 1947-70

5.4.2 “Against hypothesis”.

On the other hand, we may argue that whilst Newbolt’s disposal ratings may have been higher than average over both periods, after the war on average more cases settled before trial. Overall if we take the figures in Table T. 5. 7 we could say that after the war the referees were 39 per cent more effective in terms of settlements and disposals before trial.⁵⁹¹

Table T.5.8 Backlog

Period	Backlog	Average number of backlog cases per year	Average number of backlog cases per referee per year
1919-38	2,427	121	40
1947-70	5489	229	76
1959-62	674	168	56
1965-67	756	253	84

Source: Civil Judicial Statistics 1919-38 and 1947-70

If we then consider the backlog of cases the earlier period (1919-38) would appear the more efficient according the Table T.5.8. If we consider the increase in backlog as demonstrated by the Spreadsheet⁵⁹² we see a 276 per cent rise in backlog between 1919 and 1921 from 82 to 226 cases. What is significant is that the backlog fell from 184 in 1922, to 94 in 1931, a 51 per cent drop. This would support the hypothesis since we know that Newbolt practised caseload management as identified in chapter 3 at that time. After 1932 the backlog rose from 105 cases to 128 cases in 1934. This was the peak of the backlog in the pre-war period because the backlog then fell to 109 cases in 1938.

⁵⁹¹ 56 disposals post war – 34 disposals pre-war = 22. 22 as a percentage of 56 =39%.

⁵⁹² n.238 Line 16: Pending at the end of the year

In Table T. 5.8 we see that the pre-war average backlog per referee was 40 cases. After the war the average rose to 76 cases, a 90 per cent rise in the average backlog.⁵⁹³

If we then compare the rise in referral averages: 1919-38 (128) to 1947-70 (194) an average increase of 66 referrals each year per judge gives an average percentage rise in referrals of 52 per cent,⁵⁹⁴ We can therefore compare a 52 per cent rise in referrals to a 90 per cent rise in backlog.

A further analysis of *Judicial Statistics* to assess the effectiveness of this court is presented in Table T.5.9 taking backlog into account:

Table T.5.9 Increase in caseload.

Period	No. of years	Referrals	Average referrals per year	Trials, Disposals Withdrawals Settlements transfers	Average Disposals per year	Backlog	Average backlog per year
1919-38	20	7,683	384	5,255	263	2,427	121
1947-70	24	13,932	581	8,370	349	5,489	229

Source: Civil Judicial Statistics 1919-37 and 1947-70

What this table shows is an 81 per cent increase in referrals after the war from 7,683 to 13,932. It also shows a 59 per cent increase in the rate of the disposal of cases in that period from 5,255 to 8,370. Whilst the latter figure would support a theory of efficient micro caseflow management, the increase in case backlog after the war from 2,427 to 5,489 amounting to an increase of 126 per cent would militate against such theory. It also demonstrates that inter-referee transfers were not as efficient as might have been expected.⁵⁹⁵

We can next consider the backlog of cases at the commencement of the pre and post-war phases and compare that figure to the backlog of cases at the end of the period. Similarly, we can take the number of referrals at the commencement of the pre and post-war phases comparing them to the number of referrals at the end of the period as in Table T 5.10:

⁵⁹³ Backlog percentage rise calculated as: $76-40=36$ cases more after the war. Taking that as a percentage of the pre-war figure $36/40=90\%$

⁵⁹⁴ Referral percentage calculated as 128 cases per referee per year before the war and 194 per referee after the war gives an increase of 66 cases per referee per year. 66 as a percentage of 128 (pre-war figure) gives us $66/128=52\%$.

⁵⁹⁵ Made possible by RSC(No.3) 1949. See also: paragraph 4.4.2 above.

Table T. 5.10 Comparison of cases at beginning and end of research periods

	Backlog of Cases	
Years	Increase in backlog of cases	Rate of increase
1919 and 1938	82 to 109 (27)	33%
1947 and 1970	202 to 446 (244)	121%
	Referrals (excluding backlog of cases pending each year)	
Period	Increase in number of cases	Rate of increase
1919 and 1938	210 to 377	80%
1947 and 1970	385 to 901	134%

Source: Civil Judicial Statistics Spreadsheet 1919-70. Lines: 4 and 16.

This table shows how much the work of the court increased and demonstrates an increasing build up of the backlog and delay in the court after the war. It suggests an increasing backlog problem after the war. Chart C. 5.1 demonstrates how important it is to take account of the backlog. What it clearly illustrates is that in Newbolt's time with a rudimentary form of caseflow management the backlog was kept below the 200 mark save for 1921 (when the court received an influx of 507 cases from the Queen's Bench Division). After the war it was mostly above that level and latterly, albeit the settlement rate was rising, this did not affect the inimitable rise of backlog. This rise does not appear to have been caused by lack of judges but may be due to increasing number of referrals and complexity of matters.⁵⁹⁶

Chart C 5.1 Caseflow management analysis



*Source: Civil Judicial Statistics Analysis: Official Referees 1919-70*⁵⁹⁷

⁵⁹⁶ The interlocutory summons statistics are excluded as they are unavailable for the pre-war period.

⁵⁹⁷ n. 51 Lines 4 and 16

5.4.3 Testing comparative periods

In the research period 1919-70 there are two distinct periods before and after the war which we can examine where three referees were in post: 1920-27 and 1957-64. These have been chosen because we know Newbolt used caseflow management techniques in this period and there is some evidence in Chapter 4 as to usage by his successors in the second period. A comparative analysis of the referrals, trials, disposals, and backlog is represented in Table T. 5.11 below.

Table T 5.11. Comparative periods 1919-27 and 1957-64

Period (8 year period)	Total Referrals	Average referrals per year	Total Trials, disposals and transfers	Average disposals per year	Total backlog	Average backlog
1920-27	3,659	457	2,503	313	1,155	144
1957-64	3,576	447	2,172	271	1,404	176

Source: Civil Judicial Statistics 1920-27 and 1957-64

(a) Disposal before trial efficiency

If we take the period before the war, we can calculate the average percentage of disposals to cases referred as:

$$313/457 \times 100 = 68\% \text{ (average disposals divided by average referrals per year).}$$

After the war, the calculations is:

$$271/447 \times 100 = 61\%.$$

Here again, we see the first period as the more effective, and 7 per cent more efficient. Since we know that it was in the first period, 1920-27, that Newbolt practised a form of caseflow management it can be argued that this demonstrates that the “Scheme” had some effect. However, 7 per cent is a slight margin.

(b) Backlog efficiency

As a further comparative test we can take the average backlog before the war as a percentage of average referrals, and compare them to the same average percentages after the war. Here we take two periods where there were three referees in post in each period, thus:

$$1920-27: \quad 144 \div 457 \times 100 = 32\% \text{ average percentage backlog}$$

$$1957-64: \quad 176 \div 447 \times 100 = 39\% \text{ average percentage backlog}$$

Again, there is a 7 per cent margin demonstrating that the first period was slightly more efficient on average and also supports the hypothesis in favour of Newbolt's "Scheme."

5.4.4 Application of formulaic analysis plotting trends and influences of Newbolt "Scheme"

The hypothesis may also be tested by the application of comparative formulae. All the tests applied using formulae are based on *Civil Judicial Statistics* which have been extracted from Table XII of the relevant year's statistics and entered on the Spreadsheet appended.⁵⁹⁸ In the first test, illustrated in Chart C.5.2 below, we compare the percentage of cases settled to those referred.⁵⁹⁹

In the next test we compare the number of cases tried, disposed of by settlement or transfer to the total number of referrals (Formula A). This gives actual percentage referee efficiency in terms of disposal of the total workload each year. To assess the number of cases that were tried we then compare the number of trials to all matters referred.⁶⁰⁰ (Formula B). Finally we consider the number of cases tried to the number of referrals (Formula C). The very important distinction to bear in mind between Formulae B and C is that Formula B does not include pending cases from the previous year, i.e. backlog. Here we are considering the efficiency in terms of trials and earlier resolution. Thus, the existence of the Newbolt "Scheme" can be tested in terms of judicial efficiency by analysing the *Civil Judicial Statistics* and by the application of these formulae comparing the cases referred with the cases tried and disposed of in the years 1919-38 and 1947-70. These periods are chosen because they represent the inception and evolution of micro-caseflow management notwithstanding the absence of official records for the intervening years between 1939 and 1947 caused by hostilities in World War II. It is also chosen for the striking increase in referrals: from 7,683 between 1919 and 1938, to 13,932 in the years 1947 and 1970, an increase of 6,249 cases, or 81 per cent in the referees' list.

5.4.4.1 Analysis of disposal and settlement rates

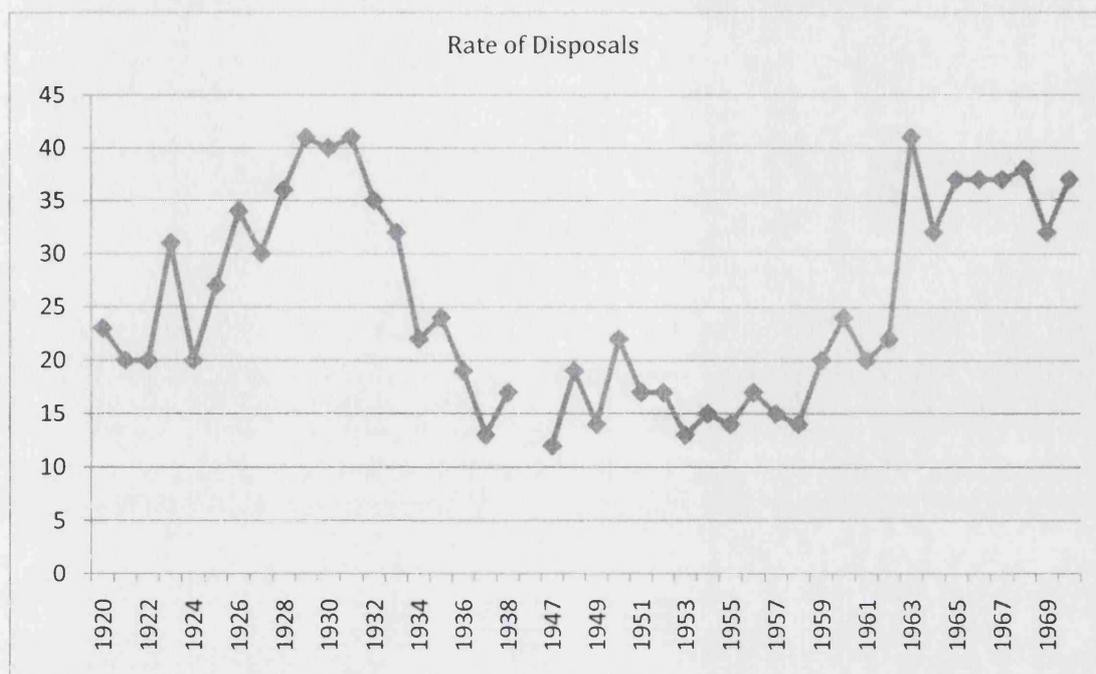
Comparing the numbers of cases withdrawn, or otherwise disposed of, to the number of referrals it is possible to calculate the percentage of such cases. This is represented by the following chart derived from an analysis of *Judicial Statistics* in the 51 year period between 1919 and 1970.

⁵⁹⁸ n.51

⁵⁹⁹ n.51 Cases disposed and withdrawn. Line 14.

⁶⁰⁰ Not including backlog: cases pending and brought into the list in previous year or years.

Chart C 5.2. Disposal rates 1919-38 and 1947-70



Source: Civil Judicial Statistics 1919-38 and 1947-70

Commentary

(a) Pre-war period

Chart C.5.2. shows a 21 per cent increase in the percentage of cases settled in the years between 1921 and 1931 from 20 per cent to 41 per cent. Between 1922 and 1923 we see an increase of 11 per cent in the number of settlements, or a 65 per cent increase in the rate of settlement. A significant factor here is the presence of two inventive referees; Scott and Newbolt who were undoubtedly assisted in achieving this record during the crucial period 1923 to 1933 by Pollock,⁶⁰¹ and subsequently Hansell. It illustrates considerable fluctuations in settlement rates. These tend to support the hypothesis that micro-caseflow management increased efficiency between 1919 and 1930. Thereafter, although the efficiency rating slumped after 1932 it remained below the 20 per cent line in Chart C 5.2 until 1958.

“For hypothesis”

If the hypothesis is correct that micro-caseflow management made the referees more efficient then we would expect to find settlement rates in the order of 27 per cent or more.⁶⁰² What we find in Chart C.5.2 is a rise in the proportion of cases settled or

⁶⁰¹ Senior Official Referee 1920-27 replaced Sir Henry Verey. K.C.

⁶⁰² 27% is the average settlement rate in the period 1919-38. See also n.51. Line 39.

otherwise disposed of before trial from 21 per cent in 1919 to 41 per cent in 1929 and 1931.⁶⁰³ This represents a 20 per cent increase in efficiency in earlier resolution.

After Newbolt's appointment in 1920, the Chart shows a 3 per cent rise in the rate of settlements although it declines to 20 per cent in the following two years. The graph then rises steeply in the next year, 1923, by 11 per cent which coincides with the year of publication of Newbolt's seminal article: *Expedition and Economy in Litigation*.⁶⁰⁴

There is therefore a probability that this rate was due to the "Scheme" he was operating. 1924 sees a dip in the rate to 20 per cent. A significant climb follows that from a base of 27 per cent in 1925 to a high of 41 per cent in 1931. After 1931 there is a sharp reduction in the proportion of settlements and disposals. We see that this is further reduced to a figure of 13 per cent in 1937, and slightly recovers just before the war at 17 per cent. During this time there were only two referees in post in this declining period: Newbolt and Scott, the latter being replaced by Pittman in 1934.

The average rate of settlement in the years 1919-38 was 27 per cent, whilst the average number of annual referrals was 348. Newbolt and his colleagues succeeded in reducing a backlog of 226 cases in 1921 to 83 cases in 1928 after which it began to rise to 126 in 1936.

"Against hypothesis."

After 1931 there was a period of decline. This is illustrated on the line chart C 5.2. by a high point of 41 per cent in 1931. There is then a period of decline to a low point of 19 per cent when Newbolt retired in 1936. If he was still practising micro-caseflow management then one has to ask, why? The answer may be found in the fact that when Sir Edward Pollock retired he was 86 years old. Lord Cave appointed George Hansell to replace him in 1927. Hansell was 71 years old. He retired at the age of 75 in 1931.⁶⁰⁵ Following that Scott retired in 1933. In that year the rate of settlement dropped from 32 per cent down to 22 per cent in 1934. Although it slightly recovered in 1935 at 24 per cent, it declined further to 19 per cent in 1936. It then fell to a low point of 13 per cent in 1937, recovering slightly at 17 per cent in 1939. These lower rates in 1937-38 may be explicable by the managerial inexperience of Eastham and Pitman, Eastham having been appointed in 1937. The latter period therefore presents a difficulty because there appears to be a rise in the number of trials, and a corresponding rise in the backlog with

⁶⁰³ Representing a 2% rise in settlement/disposal rates each year.

⁶⁰⁴ n.2.p. 427

⁶⁰⁵ By reputation he was a judge of "ability and character," *The Times*, April 20th, 1937: pg.21; Issue 47663; col D

a fall in the number of disposals before trial. If micro-caseflow management was effective then we would expect the disposals to be increasing and the backlog to be falling. That is not the case here. In fact we find the reverse as illustrated below in Table T.5.12:

Table T 5.12. Comparison of Trials, disposals and backlog 1932-38

	1932	1933	1934	1935	1936	1937	1938
Trials	96	102	134	139	179	208	202
Disposals	107	102	75	86	70	50	63
Backlog	105	112	128	127	126	112	109

Source: Civil Judicial Statistics 1932-38

Given the figures in the Chart C 5.2 the average percentile for settlements between 1919 and 1932 is 30 per cent. Between 1933 and 1937 it is 21 per cent. The margin of difference cannot be ignored, and if micro-caseflow management did make a difference in the first pre-war period it is difficult to argue that it had a similar effect in the latter pre-war period. Thus, the trends indicated from *Judicial Statistics* and contained in the Chart C 5. 2 support the hypothesis up to 1933. Post-1933 the trend, as illustrated in Chart C 5.2, does not support the hypothesis in respect of efficiency.

(b) Post-war period

Looking at Chart C 5.2 after the war we find that in 1947 the disposal rate was much lower at 12 per cent. The figures then fluctuate between 19 per cent in 1948, and 14 per cent in 1958. After that, disposal rates rise to 20 per cent in 1959. They do not rise above that rate until 1962 when the rate rises to 22 per cent. In 1963 it rises to 41 per cent; equivalent to the rates in 1929-31. This apex coincides with the appointment of Richards who by reputation was an exponent of the Newbolt philosophy of effective management. During his tenure of office, the rate of settlement did not fall below 32 per cent of referrals and averaged 36 per cent. This compares very favourably with a 27 per cent average rate of settlement achieved during Newbolt’s era. The average settlement rate for the post war period was 24 per cent, as compared to 27 per cent in the pre-war period. In that context the Newbolt era was arguably more efficient. On this narrower analysis, the Richard’s era was more efficient in terms of settlement than Newbolt’s time. Taking a wider view, accounting for backlog we find that whereas in Newbolt’s time the referees halved the backlog, in Richards’s time it almost trebled. An argument in support of the overall effectiveness of micro caseflow management in the post-war period is more difficult to sustain.

5.4.4.2 Formula A Test Disposal test

We can carry out further tests of the hypothesis over the whole research period adopting other formulae.

Key

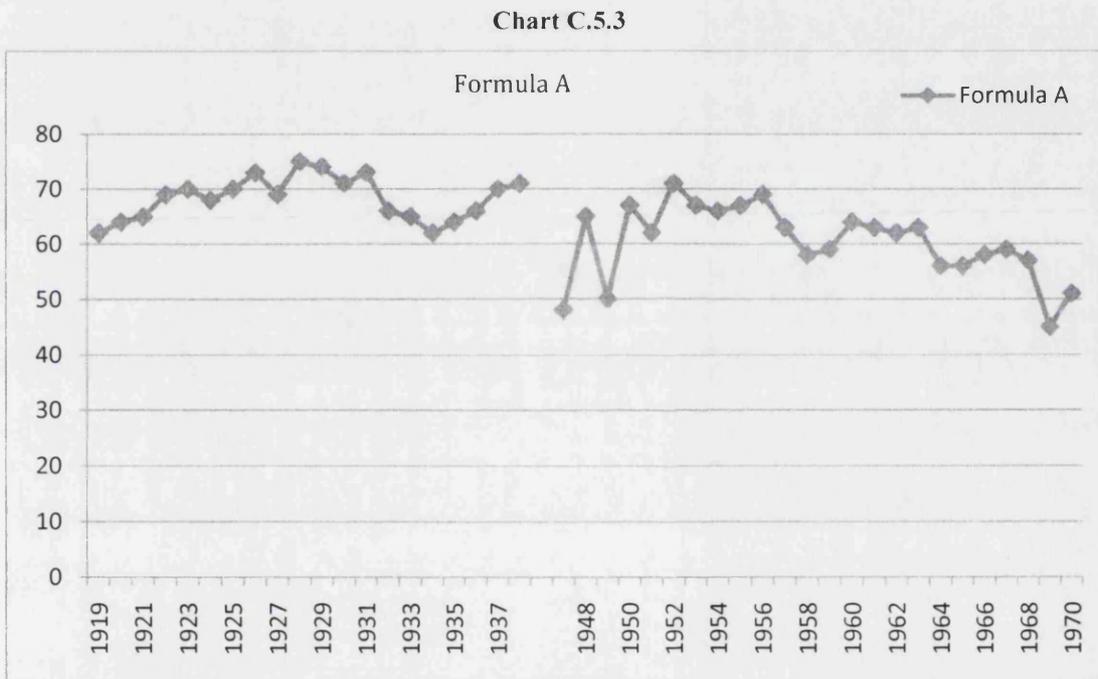
Formula A is defined as:

$$\text{Formula A}^{606} = \frac{\text{Cases tried (B 13)} + \text{Cases withdrawn or otherwise disposed of (B14)} + \text{Cases transferred (B 15)} \times 100}{\text{Total references for trial (B5)}}$$

Thus,

$$A = (B13+B14+B15) \times 100/B5.$$

Applying this formula to our *Judicial Statistics Spreadsheet*⁶⁰⁷ a graphical illustration of this formula is represented by Chart C.5.3:



Source: Civil Judicial Statistics 1919-38 and 1947-70

Commentary

Chart C.5.3 indicates a high turnover of cases referred especially before the war. These figures for dealing with workload mostly range in the 60-70 per cent bar-line with eight entries ranging above the 70 per cent bar-line; seven of those entries appear in the pre-war period and only one after the war in 1952. Thus, at first glance it may be considered that the referees in Newbolt's era were the more efficient.

⁶⁰⁶ n.51 Line 13.

⁶⁰⁷ n.51 Line 13

This chart compares the overall activities of the court: trial, settlement or disposal, transfer and withdrawal to the number of referrals which includes the backlog of cases to be tried that may have been held in the list from previous years. The average percentile before the war using Formula A is 68 per cent and after the war it is 60 per cent. The formula thus favours the pre-war era as the more efficient. The critical factors here are the numbers of cases referred and the manpower resource as earlier demonstrated by Tables T.5.1 and T 5.2 and by the Spreadsheet analysis. Interestingly, during Newbolt's time the number of referrals in 1936 represented a 56 per cent increase in the volume of referrals since 1919. In Eastham's time, 1937-54, there was a 57 per cent increase in referrals.

5.4.4.3 Formula B Test

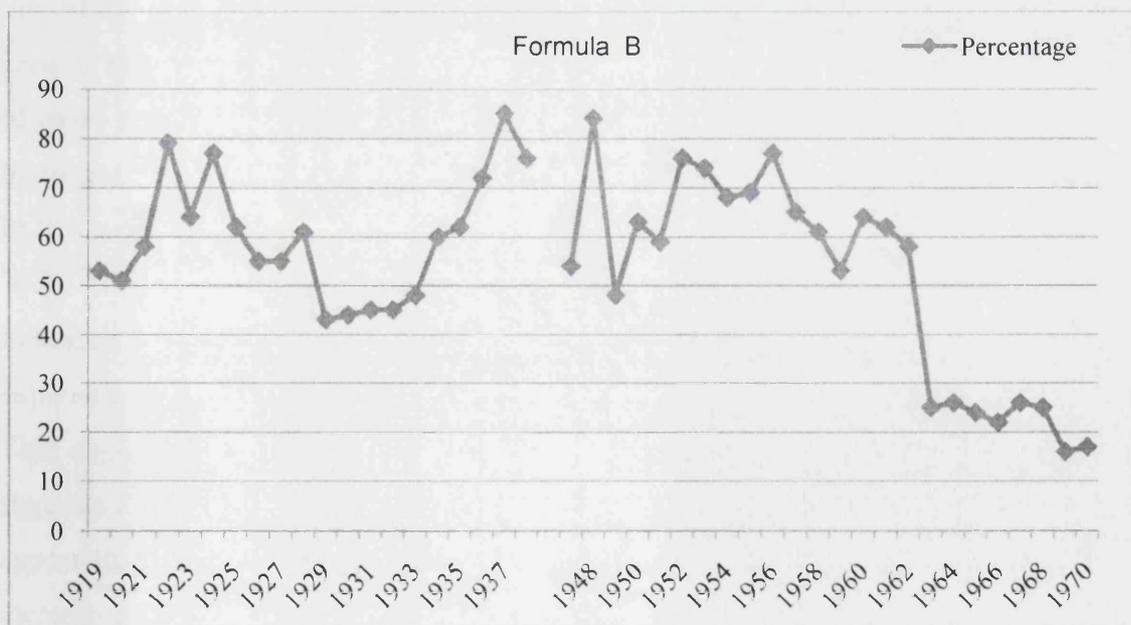
Formula B is a slightly different comparison measuring the proportion of cases tried to cases brought in⁶⁰⁸: $B13 / (B7+B8+B9+B10+B11+B12) \times 100$.

Key

Here Line B13 represents the number of cases tried. This figure is divided by B7, the number of cases brought in during a given year; plus B9, cases referred by a Master; plus B10, cases referred by way of appeal from an arbitrator's award; plus B11, cases transferred to the referees list, and B12, cases that have re-entered the referee list following a prior setting aside of judgment. Applying 100 as the multiplier gives us the percentile.

The graphical illustration of Formula B is represented by:

Chart C 5. 4 Percentage of cases tried to cases brought in



Source: Civil Judicial Statistics 1919-38 and 1947-70

⁶⁰⁸ n.51. Line 37. Note cases "brought in" do not include cases pending at the end of the year i.e. backlog of cases.

The application of this formula demonstrates efficiency excluding the backlog factor. Here we see an initial rise in productivity from 53 per cent in 1919 to 79 per cent in 1922. Leaving aside 1923 which saw a fall to 64 per cent, we see a stepped fall from 77 per cent in 1924 to 43 per cent in 1929. We then see an increasing rise in trial efficiency from 1929 to 1937 (the year after the retirement of Newbolt) to 85 per cent. From this we may conclude, that despite the falls in 1924 and 1929 (the latter possibly influenced by the catastrophic financial crisis of 1929) the overall 60 per cent average was an efficient figure, certainly better than the post war period. In that period we see a low rating of 54 per cent in 1947, but a strong influx in 1948 coinciding with a 62 per cent increase in referrals in that year as compared to the previous year.⁶⁰⁹ There are fluctuations between 1949 and 1959 of 5 per cent.⁶¹⁰ From 1959 there is a sharp decline to 25 per cent in 1960 and further down to 16 per cent in 1969. The percentile recovered only by 1 per cent in 1970.

Applying this formula (by adding all percentages in Line 37 of the spreadsheet divided by the number of years) the average efficiency percentile attained before the war is **60 per cent** and after the war it is **51 per cent**. If we compare that result with the Formula A result: 68 per cent before, and 60 per cent after the war. The formulae indicate an 8 per cent to 9 per cent drop in the efficiency rating. Both formulae therefore favour the pre-war era as the more efficient. This is further supported by the average settlement rate of 27 per cent in the pre-war period as opposed to 24 per cent in the post war period. The difference here is slight, but in average terms we are considering a quarter of cases referred that are disposed before trial. This equates to the extent of caseload management measured in Table T.5.39 on a hypothetical basis.

In this period we see a high rise in the backlog of cases from 163 in 1963, to 446 in 1970. Whilst caseload increased by 204 per cent in the 1963-70 period the backlog increased by 274 per cent in the same period. What this suggests is that even with three experienced and skilled judges the court could not cope with the increasing workload.

This suggests that even with a degree of micro-caseload management (as has been suggested in chapters 3 and 4) such procedures were not wholly effective. It would appear that the referees increasing caseload was exacerbated by a backlog which was increasing at a higher rate than referrals.⁶¹¹

⁶⁰⁹ 385 cases were referred in 1947, and 617 in 1948. See: n. 560 Line 5 AD, AE.

⁶¹⁰ Percentage for 1949 was 48%, and for 1959 53%.

⁶¹¹ This may eventually have led in the mid 1980s to a situation where cases were quadruple booked.

5.4.4.4 Formula C Test

The final test by formula is Formula C. This is represented by:

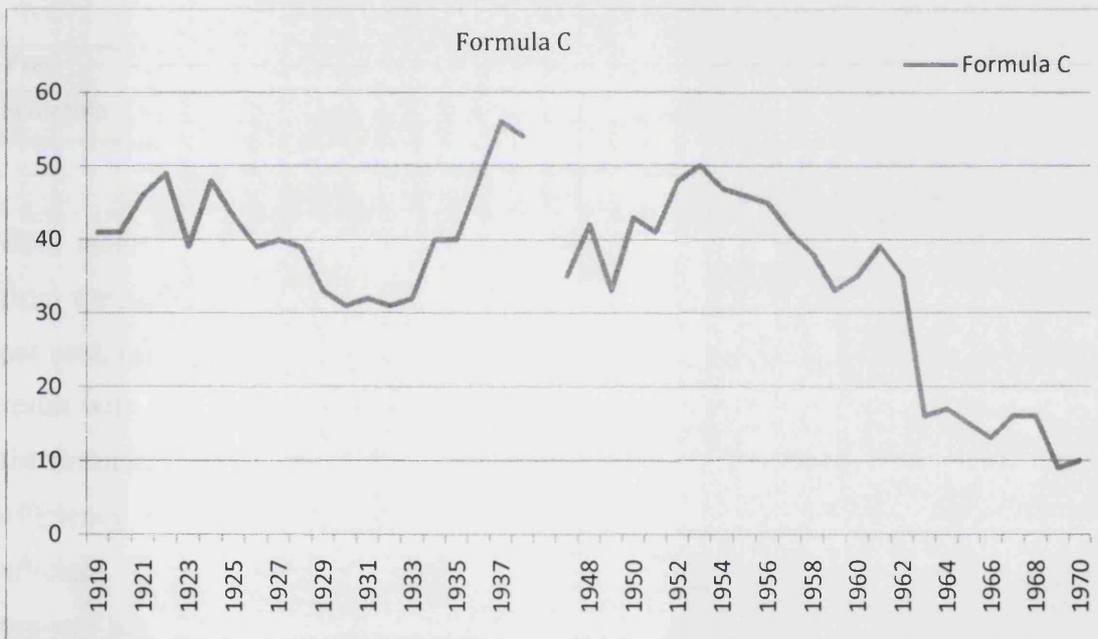
$$C = \frac{\text{Number of cases tried (B 13)}}{\text{Total references for trial (B 5)} \times 100$$

This formula gives an average of 41 per cent of cases tried to cases referred in the pre-war period and an average of 32 per cent for the post-war period.⁶¹² Since the total referrals for trial also includes the backlog figure, the overall conclusion supports the earlier contention under Formula B, that after the war the referees found it increasingly difficult to cope. This was despite a use of micro-caseflow management.

Upon examination the graph shows a marked decline in trials from a high of 50 per cent of referrals in 1953, in the days of Eastham, Caswell, Leach and Cloutman, to a low of 9 per cent in 1969, at the time of Stabb, Richards and Carter.

This is represented by the graphical illustration:

Chart C 5.5. Percentage of cases tried to cases referred



Source: *Judicial Statistics 1919-38 and 1947-70*

We have determined that the period before the war was more efficient in terms of settlement.⁶¹³ We have also concluded from the application of Formulae A and B that the pre-war period 1919-32 was an efficient period. If we now apply Formula C we find that the pre-war period had an average 41 per cent efficiency rating, and the post war

⁶¹² n.51 Line 38.

⁶¹³ See pp: 181,183-187, and also below at 193 and 194.

period an average 32 per cent rating. We also find that between 1948 and 1957 trial rates were in the 40/50 per cent range, but fell down to 10 per cent in 1970.⁶¹⁴

5.4.4.5 Conclusions based on formulae

By applying **Formula A** we found that the average percentage of efficiency was higher before the war at 68 per cent as opposed to 60 per cent after the war. Higher efficiency coincided with the time when the “Scheme” was used.

In the application of **Formula B** (cases tried to cases brought in excluding the backlog) we find relatively high efficiency rates for certain years with the highest attained in 1937 when only two referees were in post. Tables T. 5.13 and T. 5.14 put the highest figures in perspective:

Table T. 5.13. Highest trial efficiency pre-war

Year	1922	1924	1936	1937	1938
Percentile	79%	77%	72%	88%	76%

Source: Judicial Statistics 1919-38 and 1947-70

Table T. 5.14. Highest trial efficiency post-war

Year	1948	1952	1953	1956
Percentile	84%	76%	75%	77%

Source: Civil Judicial Statistics 1919-38 and 1947-70

Both tables demonstrate high ratings for particular years, but the average percentage from the spreadsheet⁶¹⁵ gives us an average 60 per cent in the pre-war period, and 51 per cent, after the war,⁶¹⁶ the difference being a factor of 9 per cent. If we compare that result with the Formula A results: 68 per cent before, and 60 per cent after the war,⁶¹⁷ the formulae indicate a 9 per cent (Formula B) to 8 per cent (Formula A) drop in the efficiency rating. Both formulae therefore favour the pre-war era as slightly more efficient. This is further supported by the average settlement rate of 27 per cent in the pre-war period, as opposed to 24 per cent in the post war period. Such distinctions are relatively minor. What this suggests is that even with three experienced and skilled judges the court found it difficult to cope with the increasing workload.

This suggests that even with a degree of micro-caseflow management (as has been suggested in Chapters 3 and 4) such procedures were not as effective as might be

⁶¹⁴ n.51 Line 38. Average percentages at 38W and 38 BC.

⁶¹⁵ n.51 Line 37 W and BC

⁶¹⁶ Paragraph 5.4.3.3

⁶¹⁷ Paragraph.5.4.3.2.

expected. It would appear that the referees increasing caseload was exacerbated by a backlog which was increasing at a higher rate than referrals.⁶¹⁸

In the application of **Formula C** the overall conclusion supports the earlier contention under Formula B, that after the war the referees found it increasingly difficult to cope, despite a use of micro-caseflow management. When we apply this formula we conclude an average efficiency percentage of 41 per cent of cases tried to cases referred in the pre-war period, and an average of 32 per cent for the post-war period. On this showing also the former period appears the more efficient.

5.4.4.6 Summary of findings from formulae applied to years 1919-70

Table T 5.15 Formulae findings

Formulae	Pre-war	Post-war	Difference
Formula A ⁶¹⁹	68%	60%	8%
Formula B ⁶²⁰	60%	51%	9%
Formula C ⁶²¹	41%	32%	9%
Settlement rate ⁶²²	27%	24%	3%

Source: Charts C 5.2 –C 5.5

Table T.5.15 summarises the findings from the application of the various formulae and from these findings we may conclude:

1. That the pre-war era was marginally more efficient than the post-war era for the disposal of cases whether by trial settlement or otherwise. This may be significant since Formula A is measured against referrals which includes, not only cases brought into the list in the given year, but cases held over (backlog) from the previous year or years.
2. That in taking out the backlog figures and applying Formula B we can see a similar marginal difference as with Formula A. This would suggest a continuation of the “Scheme” as supported by the conclusions in chapters 3 and 4.
3. Looking at Formula C we note again that it is Newbolt’s time that appears marginally more efficient.

⁶¹⁸ This may have led in the mid-1980s to an impossible situation where cases were quadruple booked.

⁶¹⁹ **Formula A** = Cases tried (B 13) + Cases withdrawn or otherwise disposed of (B14) + Cases transferred (B 15) x 100 / Total references for trial (B5)

⁶²⁰ **Formula B** = B13/ (B7+B8+B9+B10+B11+B12) x 100.

⁶²¹ **Formula C** = Number of cases tried (B 13) / Total references for trial (B 5) x 100

⁶²² Cases withdrawn, transferred or otherwise disposed of/referrals x 100.

4. When we consider the settlement disposal rate,⁶²³ particularly in the context of what Newbolt describes as his “discussions in chambers,” we find an increase of 21 per cent between 1919 and 1929.⁶²⁴ Since we have established that Newbolt was operating his “Scheme” at this time we may consider the hypothesis proved in that respect for that time. It is difficult to demonstrate any effect in the latter Newbolt period (1932-36) when there appears to be a 9 per cent drop in settlement rates.⁶²⁵
5. The margin of difference in average settlement rates between the pre-and post war periods is not significant. We can say that they are about the same with some high settlement rates, e.g. 1963.

Having looked at the average disposal rates for the court we can also consider the particular efficiency of the leading referees of this period below in paragraph 5.4.5.

5.4.5 Comparative average analysis of (a) Newbolt period 1920-36, (b) Eastham period 1936-54, and (c) Carter period 1954-70.

Table T 5.16 Comparative average analysis

Referee	Formula A	Formula B	Formula C	Settlement Rate
Newbolt	68%	58%	40%	29%
Eastham	64%	69%	45%	13%
Carter	60%	45%	28%	27%

Source: Civil Judicial Statistics 1919-38 and 1947-70 and Charts C 5.2-C 5.5

Table T.5.16 gives us the average percentile of each formula and settlement rate deduced from *Judicial Statistics* and the line charts C.5.2-C.5.5 suggest:

- a. That in applying Formula A (Chart C 5.3) the average rate for the disposal of cases by trial in proportion to those settled or disposed of, was marginally greater in Newbolt’s time than in Eastham’s tenure. Eastham’s record was also marginally greater than Carters.. This may not be very significant, but demonstrates that Newbolt’s court was relatively efficient both in trials and in earlier resolution, and
- b. That in terms of the settlement rate it is arguable that Newbolt’s “friendly discussions in chambers” may have made some difference. Certainly, we see a significant variation between Newbolt’s settlement rate which is

⁶²³ Paragraph 5.4.3.1.

⁶²⁴ And also in 1931.

⁶²⁵ This is clearly demonstrated in Table T 5.12 and Chart C. 5.2.

more than double Eastham's rate. This tends to support my view that Newbolt was more activist than Eastham.

- c. The Eastham court had the highest average rate of trials applying the Formula B test, but was not so efficient when taking into account the backlog which is included in Formula C
- d. Application of Formula C also suggests that Eastham's court tried more cases than his predecessors or his successors and may have been more effective and efficient in this respect.

This analysis tends to support the hypothesis to the extent that Newbolt's court was the more efficient court in the period 1921-31 but that the overall efficiency difference with the post-war court is marginal, save with regard to increasing backlog after the war. We may conclude for the early period in Newbolt's time that this efficiency was probably due to the rudimentary caseload management techniques he practised and advocated.⁶²⁶

⁶²⁶ n.2 p 427

PART B EXPENDITURE OF TIME

5.5 Statistical Analysis of Time Expended

Having tested caseflow efficiency by the formulae we now turn to consider the time expended on referee work and to what extent, if any, this may have been affected by the “Scheme” or its development in later years. By reference to the Spreadsheet⁶²⁷ the number of days spent on cases in certain years may be compared to the numbers of cases completed, transferred or withdrawn. Whilst this picture is not perfect it gives some indication as to the effectiveness of referees over the course of time. Micro caseflow management is a possible reason for referees in the post-war period being able to work as Commissioners of Assize, although, as has been suggested, they were unable to cope with the increase in referrals and their backlog.

5.5.1 Average trial time

In an attempt to ascertain relative levels of time-efficiency in the pre and post-war periods we can compare Tables T 5.17 and T.5.18 below.⁶²⁸ From the comparison we see that there is a marginal difference of 15 days more spent by referees after the war than before. The average trial-time difference is miniscule. In exact terms the measurement is 2.2 trial days before the war and 2.6 trial days after.⁶²⁹ If we take 3 hours 20 minutes per day as a notional trial day then the calculation would be 7 hours and 20 minutes (before the war) as compared to 8 hours and 40 minutes (after the war) per trial per referee.⁶³⁰

Table T 5.17 Average days sat per referee

Period	No. of days sat	Total average no. of days sat	Average no. of days sat per referee
1922-38	7,163	421	140
1947-70	11,177	466	155

Source: Civil Judicial Statistics 1922-38 and 1947-70

Table T 5.18 Average time per trial

Period	No. of days sat	No. of trials	Average no. of days sat per trial
1922-38	7,163	2,661	2 days 3 hrs. 30 mins.
1947-70	11,177	4,360	2 days 2 hrs. 48 mins.

Source: Civil Judicial Statistics 1922-38 and 1947-70

⁶²⁷ n.51 20A-20BA.

⁶²⁸ *Judicial Statistics* published for years 1919-21 did not include referees days sat.

⁶²⁹ See above: Table T.5.38 and paragraph 5.9.2.1 (Pre-war) and Table 5.38 and paragraph 5.9.2.2 (Post-war)

⁶³⁰ 3 hours and 20 minutes is calculated from the average minuted time at paragraph 5.6.2.

From such average assessment we may conclude:

1. That average trial times were practically the same for both periods;
2. That the referees may have adopted similar approaches to trials;
3. That the referees spent an average of 10% more time on trials after the war than before it [T.5.17].

PART C MICRO CASEFLOW TIME MANAGEMENT

5.6 Data collection: Minute Book/judge's notebook analysis post-war. [1959-62]

Having analysed data from *Civil Judicial Statistics* 1919-47 and 1947-70 we now turn to examine other data from the original court sources. The Minute Books were records maintained by the referees' clerks being a summary of matters occurring during the course of the trial.⁶³¹ They constitute the primary source of this data collection and quantitative analysis in relation to a hypothetical efficiency rating which we later apply to *Judicial Statistics*. This is based on the three earliest surviving referee Minute Books, and related notebooks at the National Archives. Whilst the analysis covers the closing phase of the post-war period, the data of the subsequent years is illustrative of traces of some aspects of rudimentary caseflow management. It is also the only available contemporary evidence that could assist the analysis in the absence of earlier Minute Books. The selection of Minute Books was prescribed by the evidence available. No earlier evidence was available and thus those surviving for the earliest time were subject to my examination and analysis.

Appendix C.5. contains data analysis from the relevant Minute Book⁶³² entries in data collection schedules which contain:

1. Name of case
2. Date of hearing
3. Type of Case and evidence, if any, of rudimentary caseflow management device
4. Time occupied by the Court

The following analysis is of the time spent by the court in hearing cases referred by the Master or the High Court judge. The analysis distinguishes building from other types of case. The analysis demonstrates that and demonstrating that case type does not affect time spent. What is a factor is the quantity and complexity of the evidence the court must evaluate.

5.6.1 Data analysis: Minute Books Nos. 4 and 5-Sir Walker Carter QC

In the period 1959-62, a total of 621 cases were referred to the three referees in post.⁶³³

This may be tabulated as follows according to year:

⁶³¹ Minute Books J.116 Series.

⁶³² See also: analysis of Minute Books 1959-62 and 1965-67 are found in Appendix C.5.

⁶³³ n. 51 Line 20A-20BA

Table T 5.19 Referrals 1959-62

1959	1960	1961	1962
158	154	165	144

Source: Civil Judicial Statistics 1959-62

This means that the average number of cases per referee was 207 cases in that period. This meant a *per capita* average allocation of 51 cases per year. This figure is in excess of the actual figures recorded in Minute Books J 116/1 and J 116/2 reviewed here for the purpose of this statistical analysis. This analysis indicates an average of 25 cases per year for Carter. It is difficult to reconcile this figure with the cases entered in the surviving Minute Books. What we are given is merely an impression of a particular referee's effectiveness. Importantly we see how long it took him to deal with certain types of reference. In this latter context such analysis is of value.

5.6.2 Time expended (*Judicial Statistics*)

(a) Notional time

If we take referee-days spent in 1959-62 we obtain an average of 368 days for 3 referees. The average therefore for one referee would be 92 days per year.⁶³⁴ In calculating a notional time we adopt the average time per case by adding all the time taken for each trial in the Minute Books for 1959-62 and dividing that amount by the number of trials to get a notional time per trial per referee.

Calculation of notional time

Given: Walker Carter's Minute Books Nos. 4 and 5. 103 cases from April 1959 to Dec. 1962

Time spent in total= 1,023 hrs. 57 mins.

$$\text{Average time} = \frac{1,023 \text{ hrs. } 57 \text{ mins}}{103} = \frac{61,437 \text{ mins}}{103} = 9 \text{ hrs. } 57 \text{ mins.}$$

According to the Minute Books Walker Carter sat for 303 days dealing with 103 cases.

Each case therefore took $303 \div 103 = 2.9$ days, say 3 days per case.

Therefore, the average notional time per day allotted to each case = $\frac{9 \text{ hrs. } 57 \text{ mins}}{3} = 3 \text{ hrs } 19 \text{ minutes}$

which we have rounded up to **3 hours 20 minutes**.

Applying this notional average trial time of 3 hours 20 minutes over the 4 year period, 1959-62, in Table T 5.20 we calculate an average notional time per case in Table T 5.21.

⁶³⁴ Lord Cairns originally estimated that each referee would sit for 200 days per year from 10 a.m. until 4 p.m., a 5 hour day. LCO 1/173 [HPIM 0457]

Table T 5.20 Expenditure of time

Year:	1959	1960	1961	1962
Trials:	158	154	165	144
Days spent:	382	392	354	346

Source: Civil Judicial Statistics 1959-62

Table T 5.21 Notional time

Year	Average notional time
1959	8hrs 4mins
1960	8hrs.29mins
1961	7hrs.12mins
1962	8hrs.

Source: Judicial Statistics 1959-62 and J.116/1 and Minute Book No. 4 (1959-62)

This gives us a notional annual-average trial time of seven hours 54 minutes.

(b) Actual time

These nominal times might be compared to the time actually taken by Carter as recorded in the relevant Minute Books⁶³⁵ for those years. That time was recorded from these records as in Table T 5.22:

Table T 5.22 Carter’s Time recorded 1959-62

Year	Number of Cases tried by Carter	Time Carter spent on all cases in period	Average Time Carter spent per case
1959	28 cases	218hrs. 57mins	7hrs. 48mins
1960	27 cases	338hrs. 40mins	12hrs. 33mins
1961	28 cases	369hrs. 45mins	13hrs. 12mins
1962	20 cases	96hrs. 29mins	4hrs. 49mins

Source: J.116/1 and 2, Carter. Minute Book Nos.4(1959-62) and 5 (1962-65)

This analysis includes times lesser and greater than Carter’s average time per case of nine hours 57 minutes calculated at 5.6.2 (a). It seems that in the first year he dealt with his cases in quicker time, but in the succeeding two years he spent more time. In the last year he appears to have disposed of his cases in less than half the average time. Measured against the *Civil Judicial Statistics* tables it would appear that Carter dealt with a smaller percentage of trials than his colleagues. His percentage of the total referee caseload in this four-year period accounted for in the surviving Minute Books amounts to:

⁶³⁵ See: compilation of all time recorded in Carter’s Minute Books Nos. 4 and 5. Appendix. Chapter 5.

Table T 5.23 Carter's share of caseload

1959	1960	1961	1962
18%	18%	17%	14%

Source: J.116/1 and 2, Carter. Minute Book Nos.4 (1959-62) and 5 (1962-65)

5.6.3 Time expended (Minute Books)

Closer analysis is possible to determine how proportionate the referee's use of time was. However, if we consider the time recorded by Carter in his Minute Books (Nos. 4 and 5) taking them as a contemporaneous record of the work of one referee, we find that he heard 103 cases in the period 30th April 1959 to 30th December 1962 as a referee. The rest of his time was spent as a Commissioner.⁶³⁶ Altogether he spent 1,023 hours and 57 minutes in hearings in this period. The average time he spent on a case was 6 hours and 41 minutes. Measured in referee Sitting Days as recorded in the Minute Books, he spent 303 days in dealing with referee business in this period. According to *Civil Judicial Statistics*, all three referees spent a total number of 1,474 sitting days in the period 1959-62. Carter spent 21 per cent of that time. In that same period he dealt with 103 cases or 17 per cent of the caseload. This approximates to one-fifth of the referees' total sitting time and one-sixth of the caseload.

This is demonstrated in the following table T 5.24.

Table T 5.24 Carter's sittings 1959-62

Year	1959	1960	1961	1962	Total
Days sat by Referees Source: Judicial Statistics	382	392	354	346	1474
Days sat by Carter Source: Minute Books	68	76	103	40	287
Source: Minute Books and notebooks.	80	76	103	44	303
Percentage of referees' sittings sat by Carter Source: Minute Books	18%	18%	28%	10%	(19% of all referees' time)
Source: Minute Books and notebooks	21%	19%	29%	13%	(21% of all referees' time)
Cases	28	27	28	20	103

Source: J.116/1 and 2, Carter: Minute Book Nos. 4(1959-62) and 5 (1962-65): J.114./41 Notebook 1959-63 and J.114./44 Notebook. 1962-65 and *Civil Judicial Statistics* 1959-62.⁶³⁷

⁶³⁶ LCO 2/6077 Memorandum Sir George Coldstream to Lord Chancellor 14th March 1965 [HPIM 0837]

⁶³⁷ *Parliamentary Papers* for 1959: 1960-61 Cmnd. No. 1126. Vol. 27; for 1960: 1960-61 Cmnd. No. 1745 Vol. 27; for 1961: 1961-1962 Cmnd. Vol. 30; for 1962: 1962-63 Cmd. 2055. Vol. 30;

5.6.4 Caseflow time-management analysis 1959-62

Having considered the influx of cases, and the time expended it is possible as a further analysis to attempt some measurement of the efficiency of micro caseflow management taken from the Tables 3 to 8 in the Appendix of recorded and minuted cases. In this it is possible to analyse cases according to type and identify caseflow management elements as defined in Chapter 3 as follows: ⁶³⁸

Table T 5.25 Case type/time spent (Minute Books and notebooks) 1959-62

Type of Case	Number of cases	Proportion of time (days) Spent
Building	74	215
Dilapidations	7	16
Commercial	5	6
Other	13+4*	53+4*

Sources: *J.116/1 and 2, Carter: Minute Book Nos.4(1959-62) and 5(1962-65); J.114/41 Notebook, 1959-63, and J.114/44 Notebook, 1962-65*

*Notebook cases where time can be ascertained.

Commentary

This simple analysis confirms that building cases constituted the major part of Carter's workload in these years. It indicates that it was not building cases but this category of "other cases" such as matters of account and enquiry and report that took the greater proportion of average minuted time. By dividing days spent by the numbers of cases it appears that other cases took just slightly over four days to hear. Building cases three days. Landlord and Tenant, or dilapidations cases, took over two days. Commercial cases took slightly over a day. An initial view might be that it was not necessarily building cases that were the time problem in this court, but technically complex cases which were the root of the referees' original jurisdiction. A more precise time-related analysis is possible by looking at the actual time-related figures. We can take this from an analysis of the recorded time in the Minute Books which is calculated as follows:

⁶³⁸ Appendix pp: 23-40

Table T 5.26 Case type time-related analysis 1959-62

Type of Case	Number of cases	Hours actually spent in court hearing	Average minuted time spent in each court hearing
Building	74	699 hrs. 54mins.	9hrs. 28mins.
Dilapidations	7	52 hrs 31mins.	7hrs. 30mins
Commercial	5	18 hrs.	3hrs. 36mins.
Other	13	138 hrs.16mins.	10hrs. 38mins.
Total:	99	908 hrs. 41mins.	9hrs. 12 mins.

Sources: J.116/1 and 2, Carter: Minute Book Nos.4 (1959-62) and 5 (1962-65); Notebook (1959-63); J.114/41 Notebook (1959-63) and J.114/44 Notebook (1962-65)

Observations

In Table T 5.26 we measure the average time per building case. This is measured by taking the hours spent and dividing them by the number of cases. This amounts to 567.48 minutes per case or 9 hours and 28 minutes. This is a higher average time than the average based on a notional 3½ hour day. It is lower than the average time calculated earlier under *Civil Judicial Statistics* where the lowest time recorded was in 1961 at 9 hours 39minutes. It is higher, however, than the time recorded as an average for cases in 1959 and 1962, but lower than the average case time in 1960 and 1961 by more than a 3 hour margin in each of those years.

If we take a 9 hour 28 minute average for building cases, there were 26 out of the 74 building cases in the period 1959-1962 that occupied the court for more than the average time. This amounts to 35 per cent of cases where the average time was exceeded.

Having considered the time taken in these cases it is next appropriate to consider the effect of micro caseflow management in more detail. The Minute Books have been examined and evidence of this has been found in the cases which are referred to in Table T.5.40 at the end of this chapter.

5.6.5 Micro caseflow management elements

Table T.5.40 shows that elements of rudimentary caseflow management are present in only 17 per cent of the total number of cases recorded in the Minute Books for the period 1959-62. This confirms, albeit slight, the survival of the Newbolt “Scheme” and judicial respect for more modern and enlightened techniques for saving time and cost. We see that the average time spent employing caseflow management is 5 hours and 51 minutes indicating a significant saving in time and cost. This figure does not include time spent on cases concerning costs and location because these elements of the

“Scheme” are irrelevant for this purpose since they are not time saving devices *per se*. The most effective technique appears to be a rudimentary form of early procedural evaluation cutting average time down to 3 hours and 30 minutes. This is followed by the employment of single joint experts and closely followed by judicial intervention as the more efficient tools. The 17 cases found to contain elements of micro caseflow management represent 17 per cent of the 103 cases analysed.⁶³⁹ On that basis possibly up to a fifth of such cases were case managed at this time.

Methodology

The above analysis has been facilitated by my examination of the original court records for 1959-62 at the National Archive. These are contained in the Minute Book Series J.116/1640 (which contained Minute Books Nos. 1-3 from April 1959 to December 1962). These are the earliest records of actual time spent by the referees. Having examined these records and photographed them for reference purposes I then tried to trace records following that in the J.116/2 serial. The archivist advised me that these had been lost to the archive. The next available record was J 116/3 which contained the Minute Books for March 1965 to October 1967. I traced Minute Book Nos. 5, 6 and 7.⁶⁴¹ After many further searches and enquiries J.116/4 was discovered and an analysis made of the period January to December 1967. The records were not in regular order. They overlapped between years and did not follow the entries in the judge’s notebooks. Many entries were illegible and required computer aided enhancement. There was no evidence that they had been cross-referenced to the notebooks or that anyone had checked them for the purposes of completing the Return of Annual Judicial Statistics each year. They cannot therefore be regarded as conclusive, but are relied upon as the best evidence of time recorded. In view of the availability of these records I therefore undertook an analysis of those remaining records.

5.7 Data analysis 2: Minute Books 1965-67⁶⁴²

Here I adopt the same methodology as for the first data analysis.⁶⁴³ In the period 1965-67 according to *Civil Judicial Statistics* 1,780 cases were referred to the court.⁶⁴⁴

⁶³⁹ Table T.5.40.

⁶⁴⁰ J.116/1 Minute Book No. 4 (1959-62)

⁶⁴¹ J.116/2 Minute Book No. 5 [1962-65]; J.116/3 Minute Book No.6 Court “C” [March 1965-October 1967] and J. 116/4 Minute Book No. 7 Court “C” [January 1967-October 1967]

⁶⁴² Appendix Chapter 5. Tables 10 and 11

⁶⁴³ At para 5.6.1.

⁶⁴⁴ n. 51

This may be tabulated as follows according to year:

Table T 5.27 Referrals 1965-67

1965	1966	1967
546	597	637

Sources: Civil Judicial Statistics 1965-67

On average each referee was allocated an average of 593 cases in that period almost three times as many as allocated in the 1959-62 research period. In this period 1965-67 each referee on a *per capita* basis would have had an average allocation of 198 cases per year. This figure is far beyond the actual figures recorded from Carter’s Minute Book for Court ‘C’ in J.116/3. However, another Minute Book J.116/2 covers part of the relevant period being January to March 1965 as well as another Minute Book J.116/4 which overlaps with J.116/3 for the whole of the year 1967. These are considered at paragraph 5.7.2.

5.7.1 Time expended (Judicial Statistics) 1965-67

If we take the number of sittings days spent in 1965-67 in London and elsewhere we obtain a figure of 1,219 days sat for the three referees then in post. The average number of days sat for each referee is 135 days per year. Utilising Table T. 5.28 below we can calculate the average time expended for each trial:

Table T 5.28 Expenditure of time

Year:	1965	1966	1967
Trials:	79	78	101
Days spent:	363	405	451

Source: Civil Judicial Statistics 1965-1968

If we then apply our notional average trial time of three hours twenty minutes to Table T.5.28 we obtain:

1965 $363(200 \text{ mins.})/79 = 15 \text{ hrs. } 18 \text{ mins.}$

1966 $405(200 \text{ mins.})/78 = 17 \text{ hrs. } 18 \text{ mins.}$

1967 $451(200 \text{ mins.})/101 = 14 \text{ hrs. } 54 \text{ mins.}$

If we then take the average trial time of the above three year period we obtain an average annual notional trial time of fifteen hours and fifty minutes. This is double the notional average time calculated at paragraph 5.6.2 (a) for the earlier period 1959-62.

5.7.2 Time expended (Minute Books) 1965-67

Having calculated the average times spent on trials in this period we can now compare the official statistics with an average time calculated from the surviving contemporary records at the *National Archive*. The following comparative table is distilled from Series J.116/2 (January to March 1965) and J.116/3 (March 1965 to October 1967) which latter partly overlaps with J 116/4 (January to December 1967).

We measure this in Table T.5. 29 as:

Table T 5.29 Average times per case

Year	Number of Cases	Time spent on all cases	Average Time per case
1965	18	79hrs. 59mins	4hrs.26mins
1966	21	219hrs. 37mins	10hrs 27mins
1967	16	310hrs. 32mins	19hrs. 24mins

Sources: J.116/2 Carter: Minute Book No. 5 (January-March 1965); J.116/3. Minute Book No.6 Court "C" (March 1965-October 1967); Minute Book No. 7 Court "C"(January-October 1967); J 116/4 Minute Book (January- December 1967)

If we now compare Carter's recorded times in the Minute Books with the *Judicial Statistic* analysis above we find that the time spent by Carter in sitting days in court amounted to: 5 per cent of total referee time (Days Spent) in 1965; 12 per cent of total referee time in 1966, and 15 per cent of total referee time in 1967.

Whilst this is highly efficient in terms of expenditure of time, it is inefficient in terms of numbers of cases completed (turnover) measured as:

Table T 5.30 Carter turnover rates

1965	1966	1967
23%	27%	16%

Sources: Minute Books of Carter and Judicial Statistics 1965-67

We may consider this to be inadequate when the backlog of cases in this court is rising from 242 cases in 1965 to 260 cases in 1967, a 7 per cent rise.

The backlog as we note from the Spreadsheet ⁶⁴⁵ almost doubled in the 5 years following to 1970 to a backlog in that year of 446 cases.

⁶⁴⁵ n. 51 Line 16.

Day sittings analysis: Sir Walker Carter QC 1965-67⁶⁴⁶

Table T 5.31 represents an analysis of Carter’s time extracted from his Minute Books and Notebooks 1965-67. The figures indicate a low level of time spent and may well account for the accumulating backlog problem identified above.

Table T 5.31 Day sittings analysis

Year	1965	1966	1967	Total
Days sat by Referees	363	405	451	1219
Days sat by Carter <i>Source: Minute Books</i>	31	58	80	169
<i>Source: Minute Books and notebooks</i>	31	59	85	175
Percentage of referees’ sittings sat by Carter <i>Source: Minute Books</i>	9%	14%	18%	14%
<i>Source: Minute Books and notebooks</i>	9%	15%	19%	14%

Sources: J.116/2 Carter: Minute Books: No. 5 (January-March 1965); J.116/3 Minute Book No.6 Court “C” (March 1965-October 1967); No. 7 Court “C”(January-October 1967); J 116/4 (January-December 1967); Notebooks: J.114/47 (1965-66); J.114/49 (1963-66);J.114/5 (1967);J.114/52 (1967-68)

5.7.3 Caseflow Time Management Analysis 1965-67

Table T 5.32 Case type/time spent Minute Books and notebooks⁶⁴⁷

Type of Case	Number of cases	Proportion of time (days) Spent
Building	33 35*	130 134*
Dilapidations	5	6
Commercial	7*	12
Other	11	19 20

Sources: J.116/2: Minute Books: No. 5 (January-March 1965); J.116/3 Minute Book No.6 Court “C” (March 1965-October 1967); No. 7 Court “C”(January-October 1967); J 116/4 (January- December 1967); Notebooks: J.114/47 (1965-66); J.114/49 (1963-66); J.114/50; (1966-1968); J.114/51 (1967);J.114/52 (1967-68)

Table T. 5.32 is an analysis of case-types in 1965-67 identified in Carter’s Minute Book C and Cloutman’s Notebook. Again we consider whether it is possible to conclude that building cases took an inordinate amount of time. The nature of such cases and their factual complexity undoubtedly had an effect on the longevity of the trial. Here we have two sets of entries for each class of case. The second set of figures is taken from the notebooks so that two results are given in each classification.

⁶⁴⁶ J.116/3.

⁶⁴⁷ The figures marked with an asterisk are adjusted from further information contained in the judges’ notebooks.

Building cases

If we take three hours twenty minutes as our denominator the notional average trial time may be expressed as:

130 days spent x 200 minutes ÷ 33 cases = 13 hours 6 minutes, or

134 days spent x 200 minutes ÷ 35 cases = 12 hours 48 minutes.

Other cases

If we then take the same denominator in other cases the average time may be expressed as:

37 days spent x 200 minutes ÷ 23 cases = 5 hours 24 minutes, or

38 days spent x 200 minutes ÷ 27 cases = 4 hours 42 minutes

In order to make a comparison we may simply compare the mean averages of both classifications as 12 hours 67 minutes for building cases and 5 hours and 3 minutes for others.

We may conclude that on average building cases took nearly 8 hours longer⁶⁴⁸ than other matters.

Table T 5.33 Case type/time spent (Minute Books and notebooks) 1965-67

Case type	No. of cases	Days spent
Building	33	130
	35	134
Other	22	37
	27	38

Sources: J.116/2 Carter: Minute Books: No. 5 (January-March 1965); J.116/3 Minute Book No.6 Court "C" (March 1965-October 1967); No. 7 Court "C" (January -October 1967); J 116/4 (January-December 1967); Notebooks: J.114/47 (1965-66); J.114/49 (1963-66); J.114/50; (1966-1968); J.114/51 (1967); J.114/52 (1967-68)

As with the earlier period we can also examine the actual time periods from the Minute Books to assess the effects if any of rudimentary caseflow management. These appear below in Tables T.5.40 and T.5.41.

The time spent according to the Minute Books in relation to the type of case is as follows:

⁶⁴⁸ 7 hours 54 minutes.

Table T 5.34 Case type /time related analysis 1965-67

Type of Case		Hours actually spent in court hearing	Average minuted time
Building	33	491hrs. 41mins.	14hrs. 53 mins
Dilapidations	5	13hrs. 27mins.	2hrs. 41mins.
Commercial	7	28hrs. 35mins.	4hrs. 5 mins
Other	11	65hrs. 10mins.	5hrs. 55 mins.
Total:	56	598hrs. 53mins.	10hrs.40 mins.

Sources: J.116/2 Carter Minute Books: No. 5 (January-March 1965); J.116/3 Minute Book No.6 Court "C" (March 1965-October 1967); No. 7 Court "C"(January-October 1967); J 116/4 (January-December 1967).

Observations

We have found above that the average time for building cases took 8 hours longer than other cases. Our calculations from Table T 5.32 confirm this. We notice that in this table there is a wide divergence between the time expended on building cases and other cases. This varies by as much as 12 hours 12 minutes in comparison with dilapidations references.

Having measured the recorded time spent it is possible to examine the impact of rudimentary caseflow management techniques measured in recorded time. As before a number of relevant cases have been identified from the Minute Books and are included at Table T. 5.41.

5.7.4. Micro caseflow management elements 1965-67⁶⁴⁹

From Table T.5.38 ⁶⁵⁰ we may conclude that a quarter of the number of cases in the Minute Books for the period 1965-67 disclose evidence of rudimentary caseflow management. For this purpose the other elements, such as proportionate costs orders and convenient locale, are included. It provides further evidence that the Newbolt "Scheme" survived and had an impact in terms of the average time spent. Here the calculation for average time excluding those matters which are not critical to time i.e. elements 6 and 9 (costs and locality) is 3 hours 45 minutes which is shorter than the earlier 1959-62 period by 26 minutes. In court time terms this is insignificant so that both periods were practically equally effective when caseflow management was used.

As with the earlier analysis this illustrates the value of Early Procedural Evaluation. The average time recorded is less than the earlier 1959-62 period which may indicate a

⁶⁴⁹ See Table 5.41

⁶⁵⁰ Row 4 cols 7 and 8.11 out of 43 cases identified.

slightly more experienced approach, although this case analysis represents a fifth of the overall referee caseload for the period.

Preliminary issues are the most used of the case management devices with a total of 7 examples but not as efficient as Early Procedural Evaluation. Judicial Intervention is more efficient here than in the earlier period: 2 hours 43 minutes here compared with 4 hours 49 minutes in the period 1959-62.

No evidence of the use of single joint experts is found here, although expert evidence was given in many cases. It also suggests a more passive traditional approach. Whilst this is disappointing, the analyses demonstrate that the “Scheme” survived.

On the other hand, juxtaposing the trends plotted earlier (Charts C 5.2 to C.5.5) it would appear that there were indications of increasing efficiency in this court in the 1960s as settlements became more frequent, albeit trials were of longer duration, and turnover as well as backlog became a major problem.⁶⁵¹

Taking the average times for caseload management devices in both periods 1959-62 and 1965-67, the average time spent on a case in the two periods is 3 hours 58 minutes. From our review of the Minute Books in both periods we have found that building cases took an average of 9 hours 28 minutes in 1959-62, and in 1965-67, 13 hours 36 minutes. On that basis, caseload management properly applied (averaging 3 hours 58 minutes per case) could cut trial times in half or by two-thirds⁶⁵². If that is correct then this finding supports the hypothesis in respect of the analysis of these two periods.

⁶⁵¹ The apex was reached in 1963 with a settlement rate of 41.4%.

⁶⁵² It is worth recalling Newbolt’s view that trials could complete in a fifth of the normal time where experts were used properly.

PART D CONCLUSIONS AS TO QUANTITATIVE ANALYSIS

5.8. Summary and general conclusions.

In summary we have concluded that: there is evidence of the effectiveness of the “Scheme” both before and after the war, and that the “Scheme” continued as a rudimentary form of caseflow management after the war.

From the analyses in this chapter we may conclude as follows:

1. *Judicial Statistics*

The Spreadsheet⁶⁵³ analysis contains the statistics used in this chapter apart from those obtained from the Minute and notebooks of the court. This analysis concludes that in the pre-war period 1919-38 each referee dealt with an average of 129 trials per year, and in the post-war period 1961-70 each judge dealt with an average of 96 trials per year.⁶⁵⁴ It has been possible to apply my own formulae to examine these statistics for trends that might indicate a use of Newbolt’s “Scheme.” It is submitted that the formulae applied provide evidence of some interesting patterns indicating that his “Scheme” continued after the war with varying degrees of success.

2. *Formulaic analysis*

The applications of my formulae suggest that referees in the earlier period were more efficient in terms of trials and disposals. They coped slightly better with the backlog than after the war. They resolved cases earlier in Newbolt’s time, but came under increasing pressure when there were only two referees in post after 1932.

3. *Analysis of Time Recording*

From this analysis we found that the average trial times were practically identical before and after the war and that the referees may have adopted similar approaches to caseflow management. Table T 5.17 demonstrated that the referees spent an average of 10 per cent more time on trials after the war than before it. When we compared the average number of days sat in Table T 5.17 we found that there was a marginal difference of 15 days more time spent by referees after the war than before.

⁶⁵³ n. 51 .Lines:AF 16 and AH 16.

⁶⁵⁴ Table T.5.3.

4. Conclusions of Graphical Analysis

The graphical analyses in Charts C. 5.1 to C 5.5 generally support the earlier conclusions of the time and formulaic analysis from *Judicial Statistics*.

5. Data collection post-war period 1959-62

This quantitative analysis compares calculations from the *Judicial Statistics* with those derived from the earlier Minute Books. It concludes that the referee caseload was unevenly dispersed so that although Carter appears a very efficient judge the fact is he did not have as many referrals as his colleagues. He recorded only 19 per cent of all the referees' trial time on his cases and dealt with only 16 per cent of all referee cases in this period.

6. Data collection post-war period 1965-67

This further quantitative analysis also compares calculations from the *Judicial Statistics* with those derived from the Minute Books. Once again Carter appears to be very efficient in terms of case turnover. His trial completion time averages much less than the general average obtained from the *Civil Judicial Statistics* for each referee. If we consider the time he spent in relation to his colleagues it amounts to only 14 per cent of their time (days sat in this period). In terms of the referees' caseload Carter dealt with 21 per cent of the overall number of cases referred. If he was so efficient then one would have expected his case allocation to be proportionately much higher than a fifth.⁶⁵⁵

7. Case type Minute Book Analysis

Here we concluded that building cases made up the greater part of referrals. They were not necessarily the cases involving the greatest expenditure of time. It would appear that the other cases, i.e. those not classified as building cases, namely, Landlord and Tenant (dilapidations) cases, or commercial cases absorbed the highest proportion of time. There are several exceptional building cases where the time recorded is higher than the average case time. We may also conclude for the effectiveness of Early Procedural Evaluation over other micro-caseflow

⁶⁵⁵ Part of the problem in measuring such efficiency is that some cases last much longer than others, especially complex technical factual cases. In this period Carter heard *Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties)* J.116/3 p.193 [Oct 2006 Series: SH101093]. This case lasted for 45 days.

management processes. Whilst experts make a significant contribution in the 1959-62 period they do not feature in the 1965-67 period. Judicial intervention does not appear to be as effective as might be expected. The instances are rare, but then they are very difficult to ascertain from the judges' notes. Preliminary Issues are a more popular tool of case management. Sometimes they appear to be formulated by counsel but at others by the referee in the course of the hearing after discussion with counsel.

5.9 Direct best evidence of micro-caseflow management

In completing our quantitative analysis of this court we may consider the cumulative evidence of the "Scheme" and its continuance. This is accomplished by the following table, T.5.35, which contains the incidences of rudimentary micro-caseflow management elements before and after the war discovered in this research.

Table T.5.35 Usage of micro caseflow management tools

Caseflow Management Tool	Usage found in 1919-38*	Usage found in 1947-60	Total usage found 1919-38 and 1947-60
Early Procedural Evaluation	2 ⁶⁵⁶	8 ⁶⁵⁷	10
Judicial Intervention	3 ⁶⁵⁸	26 ⁶⁵⁹	29

⁶⁵⁶ Newbolt confirms in correspondence to the Lord Chancellor that he had been engaged in this type of work (his "Scheme") for 2 years. See; letter to Lord Birkenhead 13 February 1922. LCO 4/152 [HPIM 0593] There is further reference in n. 2 p. 438.

⁶⁵⁷ *Leighton v Tait & Alt* J116/3 p.189 [Oct 2006 Series: SH101091]; *Webbs Asphalt Roofing & Flooring Co Ltd v Roper & BRM Shopfronts (A Firm)* J116/3 Minute Book No 6 . 14th March 1966, first day of trial. [CIMG. 0106]; *Barrow Brothers (Builders Lancaster) Limited v Haworth* tried at the Lancaster District Registry J.116/1. p.296. CIMG200 *S Kaplin & Son (Upholsterers) Limited v Parkins* heard on the 1st May 1959 J. 116/1 Minute Book No.4 Official Referees' Court 1959-1962 [CIMG 0160]; *Cruttenden v Philips* J114/35.[HPIM 2784]; *Hon. Mrs Courtney Cecil (Fem Sol) v D Ewell (Spinster)*. J.114/4 [HPIM1779]; *William George Mellie v Mrs A Mellie (Married Woman)* J.114/4 [HPIM1217]; *Duke of Bedford v Augusta Marie Fallie* J. 114/3. [CIMG.0045]

⁶⁵⁸ Newbolt's letter to the Lord Chancellor 3 July 1920 confirms three occurrences. LCO 4/152 [HPIM 561-567]

⁶⁵⁹ *Bickley v Dawson*. J116/3 p.191 [Oct 2006 Series: SH101092.]; *Bogen v Honneyball & Rossal Estates Limited*⁶⁵⁹ J.115/49. [HPIM 2749]; *Rowlett v Champion* J 114/1 (HPIM 1766); *Commercial Union v Collective Investments Limited* J114/6 p.176 [FR O80]; *H Wheeler (Romford) Limited v T C Chilingsworth*. J 114/6 p192 [PRO FRO 85]; *Cecil v Ewell* J114/1 p. 252; *Westheath Contractors v Borough of Grantham*. J 114/2, 3 March 1945 [FR 031-037]; *Allied Ltd v Pierless Representative (London) Ltd* J.114/3 [HPIM1193]; *London and Canterbury Motors (A Firm) v B L Koppen* J.114/3 [HPIM1195]; *William George Mellie v Mrs A Mellie (married woman)* J.114/3 [HPIM1217]; *Hiauco Limited v Tauford & Co Limited* J. 114/14 [CIMG 0079-0080]; *Frederick Baden Powell Weil v John Southern*. J.114/17 pp. 189 and 199 [SH 101134]; *James Conlon T/a J Conlon & Sons v Lloyds (Builders) Limited* J. 114/21 [CIMG0063]; *Wilson v Crac* J.114/20 [HPIM1776]; *Irvin & Sons v Blake* . J.114/24 [CIMG0546]; *Burtain Ltd v J A Tyler & Sons Ltd*. J.114/24 [CIMG 0571]; *Kefford v Brownleader* J.114/21 p. 258 [CIMG 0077]; *Bedford Theatre (London) Limited v Brisford Entertainments Limited*. J. 114/21 CIMG 0075-0076; *Martin French v*

Single Joint Expert	2 ⁶⁶⁰	6 ⁶⁶¹	8
Expert Determination	1 ⁶⁶²	4 ⁶⁶³	5
Experts and Settlement	0	2 ⁶⁶⁴	2
Proportionate Costs Orders	3 ⁶⁶⁵	20 ⁶⁶⁶	23
Special Pleadings	0 ⁶⁶⁷	3 ⁶⁶⁸	3
Preliminary Issues	0	30 ⁶⁶⁹	30

Kingswood Hill Ltd J116/1 [Oct. 2006 series HPIM1964]; *Clifton Shipways Co Limited v Charles Lane* J116/1 p.104. [CIMG 0176]; *James Kinross v R H Tarrant*. J. 116/1 [CIMG 0178.]; *Sergeious Papa Michael v A K Koritsas* J.116/1. p. 207. [CIMG 0190]; *Townsend Builders Ltd v France* J 114/41. p.180. [Dec. 2006 Series CIMG 0638]; *W J Barrs Limited v Thomas Foulkes* J116/3. [CIMG 0102.]; *Allason & Others v Frankpile Ltd* J114/41. p.263 [Dec 2006 Series; CIMG 0656]; *Alloy & Fireboard Co Ltd v F.Superstein* J115/6 [HPIM 2705].

⁶⁶⁰ This is also confirmed in Newbolt's letter to the Lord Chancellor dated 3 July 1920.

⁶⁶¹ *W.J Gray & Sons v Royal Mail Lines Limited* J.114/3 [CIMG 0041]; *Benoir Hamburges v Winifred Stort* J.114/5 [HPIM 1232]; *Albert Colegate v D Raymark (married woman)* J.114/6 [PRO II (FR) 082]; *R. Corben & Son Ltd v Forte (Olympics)* J.116/1. p. 242 [Oct.2006 Series. HPIM 2088]; *Leon v Beales* J.116/1. p.245. 7 February 1962.[CIMG 192]; *Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and Nathan Bernard and Ruth Bernard* J.116/1 [CIMG 195]

⁶⁶² Newbolt confirms one instance in his letter dated November 1921 LCO 4/152 [HPIM 0586-0587]

⁶⁶³ *Westheath Contractors v Borough of Grantham* J.114/2 [IM A0032]; *Charlton Decoration Co Ltd v Robert Murray* J.114/16 [HPIM2158]; *Phillips v Ward*. J.114/35 [HPIM2763]; *Hogg v Barnard* J114/35. p. 33 [HPIM 2766].

⁶⁶⁴ *Prails Motors Ltd v Hills Bros and Mussell* J114/28. p.1.[SH 101372]; and *John Fletcher Suter v W Pikta* J.116/1. [CIMG 0188]

⁶⁶⁵ Three examples are given in n. 2. and at paragraph 3.10.

⁶⁶⁶ *Harris v Mac Rex Foods Limited* J114/2 p. 92 [HPIM 1787 -1789]; *Plant Machinery v HP Thomas Limited* J. 114/2. [HPIM 1790]; *Jayes Limited v Home Foods Limited* J114/6 pp. 67-105.[FR 072-FR 074] ; *London and Canterbury Motors (A Firm) v B L Koppen* J.114/3 [HPIM1195]; *Zenitz Skin Trading Co Lts v Frankel Zenitz Skin Trading Co Ltd.* J.114/4 pp.121,117.[CIMG 0054]; *Benoir Hamburgers v Winifred Stort* J.114/5 [HPIM1232]; *Albert Colegate v D Raymark (married woman)*. J114/6 [FR082]; *Jays (Engineers) Ltd v Hobb Good Limited*. J114/6 [FR074] ; *H Wheeler (Romford) Ltd v F C Chillingsworth*. J114/6 [PROII FR085]; *Palmers Hebburn Company Limited v The Grimsby Steam Fishing Vessel Mutual Insurance and Protecting Co Ltd and Shire Trawlers Ltd* J.114/6 p.96 [HPIM2172] and J.114/3 [HPIM1195]; *Hayland v Springet & Son*. J.114/21 [CIMG 0061.]; *Freestone v Evans* . J. 114/21 p.30. [CIMG0065-66.]; *Dawes v Papdimitiou*. J.114/24 [CIMG0563]; *Burtain Ltd v J A Tyler & Sons Ltd*. J.114/24 [CIMG0571]; *Ridley & Ors v Kopisitzer*. J.114/35 [HPIM2794]; *J.H. Plant Ltd v Smithson*⁶⁶⁶ J.116/1 [Oct 2006 Series. HPIM 2015]; *Adkins v Joseph Cade & Co Ltd* J. 114/34. p.87. [Oct 2006 Series SH 10330]; *Shopfitting Centre Ltd v Revuelta* . J116/2 p.5.[Dec. 2006 Series SH 101775]; *Eaton Berry Ltd v King & Anor* J116/3 p.65 [Oct 2006 Series; SH101045]; *Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties)* J116/3 p.193 [Oct 2006 Series; SH101093]

⁶⁶⁷ Whilst Newbolt dispensed with pleadings in one case there is no other evidence in chapter 3. It is likely that he ordered special forms of schedules of damages.

⁶⁶⁸ *Hon. Mrs Courtney Cecil (Fem Sol) v D Ewell (spinster)* J.114/6 [HPIM1779]; *H Wheeler (Romford) Ltd v F C Chillingsworth* , J.114/6 [HPIM1779]; *F Goff & Sons Limited v Bently Golf and Country Club Limited* J115/56 [CIMG 0127-130].

⁶⁶⁹ *George Osborne Limited v E C Goddard male.* J. 114/14. [CIMG 0086]; *W H Armfield Ltd v John England Perfumers Ltd* J.114/19 [CIMG 0456]; *Jack Hyman Sockel v Issacc Francis Salmon* *Matthew Francis*. J.114/15 [CIMG 0466]; *Dorey & Son v Foster* ⁶⁶⁹ J.114/14 [CIMG 0091];

Convenient locale	1 ⁶⁷⁰	13 ⁶⁷¹	14
Total	12	112	124

Source: see footnote references

*Period effectively covers only 1919-36

Observations

Table T.5.35 is compiled from the evidence of micro-caseflow management that I have examined in the National Archive. The pre-war period is derived from the sources in chapter 3 particularly the Lord Chancellor's Office files, analysis gleaned from *Judicial Statistics* and Newbolt's seminal article.⁶⁷² But it does not represent Newbolt's claim that the employment of a court expert (single joint expert) "narrow(s) the issue to something which occupies the court for perhaps one-fifth of what used to

Davidson Engineers v Stephens & Brotherton Ltd J.114/19 [HPIM 1141]; *JC Robertson & Sons (a firm) v House*. J. 114/21 p. 213 [CIMG 0074]; *Pepper & Co Ltd v Harry Green Ltd* J.114/19 [HPIM 1125]; *Davidson Engineers v Stephens & Brotherton Ltd* J.114/19 [HPIM 1141]; *Knibbs v Goodhale Engineers Ltd* J.114/19 [HPIM 1177]; *Wilson v Eastern Counties Farmers Cooperative Association Ltd* J.114/28 [SH 101376]; *P.C.S. Ltd v Lewer* J.114/31, p.32 [SH 101190]; *Titler v Brown & Another*. J.114/35. [HPIM 2771-2773]; *Butler v Vaughan* J.114/35 [HPIM 2780]; *Middleton v Blackwell* J.116/3 [CIMG 0096]; *McConnell v Grant* J.114/35 [HPIM2780]; *Martin French v Kingswood Hill Ltd* J116/1 [Oct 2006 Series; HPIM 1964] and J.114/34[SH 101355]; *George v Russell Bros (Paddington)Limited* J.116/1 p.96 [Oct 2006 Series; HPIM 2010]; *Engineering Co Ltd v Parkwood Carlington Engineering Ltd* J.116/1 p.216 [Oct 2006 Series; HPIM 2072]; *A.T. Chown & Co Ltd v Peter Davis Investments Limited* J.116/1 p.290 [Oct 2006 Series; HPIM 2116]; *Edward Vernon Andrews v Greens (Wholesale China)* J.116/1 p.126 [Oct 2006 Series; HPIM 2025]; *Lenton v City of Coventry* J.116/1 p.136 [Oct 2006 Series; HPIM 2030]; *Shearing v Wisehill Field Company Ltd* J116/1 p.283 [Oct 2006 Series; HPIM 2113]; *George v Russell Bros (Paddington) Ltd*. J.114/35 [HPIM 2800]; *T J Kendel & Co v ATA Scientific Progress Ltd*. J.114/16 [HPIM 2186]; *Extol Engineering Ltd v .The British Process Mounting Co (a firm) and Andrews Houseware Manufacturers Ltd* J.116/2 p.283. [Dec. 2006 Series;SH101784] and see: J.114/45 p. 210 [Dec. 2006 Series CIMG 0736]; *Frederick William Young v Charles William Connery* J.116/3 [Oct. 2006 Series: SH101015]; *United Dominions Trust (Commercial) Ltd v Thomas Gravell & Prized Steele Garage Ltd* J116/3 p.99 [Oct. 2006 Series: SH101055]; *K. Cross (Doncaster) Ltd v County Council of York (East Riding)* J116/3 p.172 [Oct 2006 Series: SH101085]; *Olga Hilditch (Widow) v Charles E.H. Durham and A E L Durham(Married Woman)* J.116/4 p.19 [Dec 2006 Series;SH101810]; *Swallow Prams Limited v United Air Coil Limited* J.116/4 p.35 [Dec 2006 Series;SH101818]; *Gloucestershire County Council v Henry William Richardson (Trading as W.J. Richardson & Son) and Ocean Accident and Guarantee Corporation Limited* J.115/28 [HPIM 2733].

⁶⁷⁰ Newbolt confirms at least one instance when he travelled to Manchester to take evidence of a witness going abroad. Letter: Newbolt to Lord Chancellor 12 March 1925, LCO 4/152 [HPIM 0614].

⁶⁷¹ Eastham sat in Leeds, Henley, and Tunbridge Wells. J.114/1, 12 November 1944; J114/2 *Davis v Solomon*; J114/8 pp. 9 & 10 [HPIM 1818]. Sat elsewhere in: *Agnew v Maycock* J114/6 p.15 [PRO FR O70]; *Plaehet v Stormond Engineering Corporation Limited*. J.114/8 at p. 205; *Praills Motors Ltd v Hiles Bros & Mussele*. J.114/28 [SH 101372]; *Wilson v Eastern Counties Farmers Cooperative Association Ltd* *Wilson v Eastern Counties Farmers Cooperative Association Ltd* J.114/28 [SH 101376]; *Hogg v Barnand* J114/35. p. 33 [HPIM 2766]; *Middleton v Blackwell* J116/3.[CIMG. 0096]; *Moresq Cleaners Limited v Hicks* J116/3. [CIMG. 0110]; *Harper and Preston Limited v Marshall Castings Limited* J.116/1. [CIMG184]; *Barrow Brothers (Builders Lancaster) Limited v Haworth* J.116/1 p. 296.[CIMG200]; *United Dominions Trust (Commercial) Ltd v Thomas Gravell & Prized Steele Garage Ltd*. J116/3 p.99 [Oct 2006 Series: SH101055]

⁶⁷² n.2 and LCO 4/152. [HPIM 0568]

be considered trial time.” In other words, an 80 per cent reduction of the actual time spent. *Economy and Expedition in Litigation*⁶⁷³ also demonstrates that in certain cases Newbolt was able to exclude the need for any formal pleadings. This is also not represented here so that what we have is a very modest representation of what Newbolt may have practised. What we do have is the evidence of the *Judicial Statistics* and our analyses which point to an effective “Scheme.”

It is improbable therefore that only 12 cases represent the extent of this experiment in caseload management in Newbolt’s time. From his account⁶⁷⁴ it is likely that he used these devices extensively in complex factual cases.

We have already concluded that Newbolt devised and practised a form of micro caseload management. Whilst there is conflicting evidence as to the effect of the practice both before and after the war, we have found some evidence of the “Scheme” in 124 cases. We cannot now know how extensive this practice was in the court. The difficulty with the evidence is that it is not comprehensive so that we cannot be certain that all cases were recorded, or catalogued, or that those recorded represented all the cases tried. This is because the records at the National Archive are not comprehensive and do not include all the judges notes. Only samples were retained over the years. Although all the notebooks appear in numerical order they do not always tally with the Minute Books. Subject to that caveat the archival samples taken from Carter’s records appear relatively complete so that we can make our quantitative analysis of Carter’s use of micro-caseload management from his notebook and Minute Book records for 1959-62 and 1965-67 as follows: ⁶⁷⁵

Table T.5.36 Proportion of usage

Nat. Arch Ref.	Year	No. of cases	No. of caseload management cases	Percentile	Average
J.116/1, J.114/41	1959-62	103	18	17%	
J.116/2,3,4; J.114/51,52.	1965-67	62	17	27%	
Totals:		165	35	21%	22%

Sources: Carter: J.116/1 Minute Book No. 4 (1959-62); J.114/41. (1959-1963); J.116/2 Minute Books: No. 5 (January-March 1965); J.116/3 Minute Book No.6 Court “C” (March 1965-October 1967); No. 7 Court “C”(January-October 1967); J 116/4 (January- December 1967). J.114/51; Notebook. (1967); J.114/52; Notebook (1967-68)

⁶⁷³ n.2 p.430

⁶⁷⁴ n.2 p 438.

⁶⁷⁵ Appendix C.5. Minute Book and Notebook Records: Tables 3-8 (1959-62) and Tables 9-14 (1965-67)

5.9.1 Proportionate usage of rudimentary micro caseflow management (1959-62 and 1965-67)

Having collated all the available relevant data from the available Minute Books and notebooks of the period it is now possible to assemble the quantitative data in Table T. 5.37. This represents the proportionate usage of micro caseflow management devices identified in these periods. The calculations confirm the extent of this usage as follows:

Table T.5.37 Proportionate usage of caseflow management tools⁶⁷⁶

Case management tool	Usage in 1959-62	Usage as a percentage of the 103 cases extracted from Minute Books and notebooks 1959-62	Usage in 1965-67	Usage as a percentage of the 62 cases extracted from the Minute Books and notebooks 1965-67	Total usage in both sub periods	Total percentage of the 165 cases of usage in both sub periods
Early procedural evaluation	2	2%	2	4%	4	3%
Judicial intervention	5	5%	2	4%	7	4%
Single joint expert	2	2%	0	0	2	1%
Exert determination	0	0	0	0	0	0
Experts and settlement	1	1%	0	0	1	1%
Proportionate costs orders	1	1%	3	5%	4	2%
Special pleadings	0	0	0	0	0	0
Preliminary issues	7	7%	7	13%	14	8%
Convenient locale	1	1%	3	5%	4	2%
Total	18	19%	17	31%	36	22%

Sources: Carter: J.116/1 Minute Book No. 4 (1959-62); J.114/41; Notebook (1959-1963); J.116/2 Minute Books: No. 5 (January-March 1965); J.116/3 Minute Book No.6 Court "C" (March 1965-October 1967); No. 7 Court "C" (January-October 1967); J.116/4 (January- December 1967). J.114/51; Notebook. (1967); J.114/52; Notebook (1967-68)

5.9.2. The utility of micro caseflow management

The above table, T 5.37, demonstrates a limited, but extant use of micro-caseflow management in the periods examined, 1959-62, and 1965-67. If we applied the 22 per cent total usage to the cases brought in before the war (1919-38) we would find that of the 4,338 cases, 954 cases were caseflow managed.⁶⁷⁷ If we then apply the percentile to the 8,704 cases brought in after the war (1947-70), this would give us 1,480 cases case managed. This analysis demonstrates the possible extent of the "Scheme" and its effect.

⁶⁷⁶ Figures in this table have been rounded up as with previous tables to nearest percentage.

⁶⁷⁷ n. 51 Lines: (7-11)B to (7-11)U and (7-11)AD to (7-11)BA.

Having drawn this conclusion we then move on to consider the time that may have been saved by caseload management and the adoption of Newbolt's "Scheme" methods. This is demonstrated in Table T.5.38.

Table T.5.38 Average time per case

1919-1938		1947-1970					
Average time taken per case	Average time taken per case using caseload management	Average time taken per case	Average time taken per case using caseload management	1959-62		1965-67	
Calculated from <i>Judicial Statistics</i>		Calculated from <i>Judicial Statistics</i>		Average time taken per case	Average time taken per case using caseload management	Average time taken per case	Av. time taken per case using cfm.
2¼ days [Taking an average referee day at 3 hours 20 minutes] 7 hrs 30 mins. ⁶⁷⁸	No record But Newbolt says use of court expert reduced time by 80%. ⁶⁷⁹	8 hrs 40 mins ⁶⁸⁰	No record	7 hrs. 56 mins ⁶⁸¹	4hrs. 11 mins ⁶⁸²	15hrs. 5 mins ⁶⁸³	3hrs 45mins. ⁶⁸⁴
	12 cases identified in Table T.5.32.		66 cases recorded in Notebooks examined	83 cases in Minute Books 4 & 5 and J.114/41	17 cases ⁶⁸⁵ identified in Minute Books 4 & 5	43 cases identified in Minute Books 4 & 5	11 ⁶⁸⁶ cases in J.116/ 2,3, 4.

Sources: Minute Books and Judges Notebooks as listed in the Appendix.

5.9.2.1 Before the war (1919-38)

Table T. 5.38 has been compiled by calculating the total time spent by referees in London and elsewhere in dealing with their caseload. In all they spent 7,163 days on 2,661 trials or a notional average time of **7 hours 30 minutes**. (2.2 days per trial).

No time records are available from those days and the time here is calculated using the notional time per case calculated at paragraph 5.6.2(a) of 3 hours 20 minutes.

5.9.2.2 After the war (1947-70)

For the period 1947-1970 the average time per case is calculated from the Spreadsheet⁶⁸⁷ which states there were 4,360 trials over a period of 11,177 days.

⁶⁷⁸ Paragraph 5.5.1 applying paragraph 5.6.2(a), and paragraph 5.9.2.1.

⁶⁷⁹ n.2

⁶⁸⁰ Paragraph 5.5.1 above.

⁶⁸¹ Paragraph 5.6.2 (a) Notional annual average time.

⁶⁸² See: Table T 5.40 below.

⁶⁸³ Paragraph 5.7.1. Notional annual average time

⁶⁸⁴ See: Table 5.41 below.

⁶⁸⁵ 20 cases identified but 17 relevant for this purpose. [Table T.40]

⁶⁸⁶ 14 cases identified but 11 relevant. [Table T.41]

Applying the same notional time as in 5.9.2.1 this gives us a notional average time of **8 hours 40 minutes** per case (2.6 days per trial).⁶⁸⁸

This period has two sub-divisions 1959-62 and 1965-67.

5.9.2.3 Case and non case- managed (1959-62)

Case Managed

In the former sub-division Carter spent 87 hours and 3 minutes on 20 cases in which caseflow management techniques were used. The 17 applicable examples taken from Table T 5.40 give an average time on such cases as **4 hours and 11 minutes**. This is 44 per cent of the average time (9 hours 57 minutes) taken per case without caseflow management being used.⁶⁸⁹ This represents a saving of 56 per cent of the trial time using such process.

Non-Case Managed

We have already calculated the notional average time for Carter at paragraph 5.6.2 (a) above at 9 hours 57 minutes. Such an average is more than double the case managed time such result supports the hypothesis.

5.9.2.4 Case and non case- managed (1965-67)

Case Managed

In this period the Minute Books show that Carter spent 52 hours and 30 minutes in dealing with 14 cases where there is evidence of caseflow management techniques. The applicable examples in Table T 5.41 give an average time of **3 hours and 45 minutes** in dealing with such cases in such way. This is almost a quarter of the time spent (16 hours 2 minutes) on non-case managed cases.

Non-Case Managed Cases

We have already calculated Walker Carter's average time for non-case managed cases at 16 hours 2 minutes.⁶⁹⁰

5.9.3 Possible extent of case-managed cases

If the hypothesis is correct and the levels of case management are as described in Table T.5.37 then it is now possible to apply the percentage of case managed cases across the board to assess a likely general application of the process. Taking the average

⁶⁸⁷ n.51.

⁶⁸⁸ For paragraphs 5.9.2.1 and 5.9.2.2, see also paragraphs 5.5.1, 5.6.2, and Table T.5.38.

⁶⁸⁹ Table 5.38 Col. 5.

⁶⁹⁰ See: paragraph 5.6.2(a) above.

percentages for 1959-62 and 1965-67 and applying this to the *Judicial Statistics* figures in Appendix C.5 Spreadsheet we calculate the:

Percentage for 1959-1962=19%

Percentage for 1965-1967=31%

Average percentage applied=25%

If this average percentile were applied to the whole research period 1919-70:

Table T.5.39 Hypothetical application

Period	Referrals	Hypothetical Average percentile	Hypothetical Number of cases case managed
1919-1938	7,683	25%	1,921
1947-1970	13,932	25%	3,483
1919-1970	21,615	25%	5,404

Source: Judicial Statistics 1919-70 and Table T. 5. 37

If this hypothesis were right then a quarter of all the referee’s cases would have had some element of caseflow management process. This became increasingly important, if not imperative, in the post-war period when referrals doubled and later quadrupled.

5.10 Specific conclusions on quantitative analysis:

In this chapter we have answered the sixth research question (f) with an assessment and quantification of the impact of the “Scheme” in order to determine whether caseflow management made the referees more efficient. According to Newbolt his “Scheme” in relation to experts could save 80 per cent of time in court.

From the above quantitative analyses we may conclude:

1. From paragraph 5.7.4 that properly applied micro caseflow management could cut trial times by a half to two-thirds (Newbolt said he achieved an 80 per cent reduction)
2. From Table T.5.39 that possibly a quarter of all referrals had some form of caseflow management;
3. From paragraph 5.3.1 that whilst the disposal rates doubled in the period 1960-70, the backlog increased by 43 per cent in the period 1957-70 (Table T 5.4) whilst referrals more than doubled between 1960 and 1970 from 425 cases to 901 cases⁶⁹¹
4. From Table T.5.2 that the highest average number of days sat per referee was in 1932-38 (221 days);

⁶⁹¹ n.238 Line 5AQ to 5BA

5. That the more efficient trial times were in the Eastham period 1947-59 when the average trial time was seven and a half hours;
6. That the average disposal rate (settlements, withdrawals and transfers) was 27 per cent per annum of referrals before the war and 24 per cent of referrals after the war. The difference is marginal;⁶⁹²
7. That between 1919 and 1931 the backlog decreased by 51 per cent (See: paragraph 5.4.2.). In the same period disposals rose by 20 per cent from 21 per cent to 41 per cent of cases referred. (See: Chart 5.2) This strongly supports the hypothesis that caseflow management made the referees more efficient because it is proved that this happened at a time when we know Newbolt was practising his "Scheme." The period following that however gives a contrary indication (See: Charts C.5.2. and paragraph 5.4.4.1);
8. That Formula A supports the hypothesis in respect of Newbolt's time as the more efficient. See: Chart C.5.3- 68 per cent as against 60 per cent after the war;
9. That Formula B (which excludes backlog) also supports the hypothesis in respect of Newbolt's time as the more efficient (See: paragraph 5.4.4.3);
10. That in the post-war period 1963-70 backlog was increasing at a faster rate than referrals.⁶⁹³
11. That in average notional terms trial times doubled as between 1959-62 and 1963-65⁶⁹⁴
12. That Formula C also supports the hypothesis in respect of the Newbolt era as more efficient in terms of trials to referrals at 41 per cent compared to trial rates after the war at 32 per cent;
13. Generally, that all the formulae and disposal rates support the hypothesis in respect of Newbolt's time. We may consider this with some reservation as to the period after 1932 which was not so efficient in terms of disposals before trial;
14. Caseflow management elements were identified in 124 cases in the Lord Chancellors files and judges notebooks (Table T 5.35). 35 out of 165 cases were similarly identified in the Minute Books and notebooks in the periods 1959-62 and 1965-67 (Table T.5.36);

⁶⁹² Paragraph 5.4.1(b) and n. 51 Line 39.

⁶⁹³ Paragraph 5.4.3.3

⁶⁹⁴ Paragraphs: 5.6.2(a) and 5.7.1.

15. That the proportionate usage of caseload management in the periods 1959-62 and 1965-67 was 22 per cent (Tables T. 5.36 and T.5.37);
16. From Table T. 5.38, that caseload management saved on average up to 5 hours 46 minutes in the period 1959-62, and saved on average up to 12 hours 17 minutes in the later period 1965-67;
17. That by calculating the average percentage for those periods 1959-62 and 1965-67, and applying the percentages across the pre and post-war periods we may hypothesise that up to a quarter of all referee cases were caseload managed in some way. If that hypothesis is right then possibly as many as 5,404 cases may have utilised the "Scheme" in one aspect or another.(See paragraph 5.9.3 and Table T. 5.39)
18. The average analyses in Table T. 6.7 in chapter 6 will suggest that the post-war period was the more efficient in trials, but Table T 5.11 contrasting two eight year periods, one before, and one after, the war gives a contrary indication.
19. That referees achieved 88 per cent trial efficiency rates in 1937 and 84 per cent in 1948. (Application of Formula B at Paragraph 5.4.4.5)
20. Finally, there can be little doubt that the referees relieved the High Court judges of an otherwise burdensome workload realising one of the key objectives of the Judicature Commission.

Table T.5.40 Micro-caseflow management elements 1959-62

Type of case	Proportion of time on referee days spent basis	
Case management devices	Number of instances	Actual time expended on case as recorded in the <i>Minute Books Nos. 4 and 5</i>
1. Early procedural evaluation	2	<p><i>S Kaplin & Son (Upholsterers) Limited v Parkins</i> 1 May 1959⁶⁹⁵. 6hrs. 56min.</p> <p><i>Barrow Brothers (Builders Lancaster) Limited v Haworth</i> 3 Dec. 1962.⁶⁹⁶ 15mins.</p> <p>Average time: 3hrs 36 mins</p>
2. Judicial intervention	5	<p><i>Martin French v Kingswood Hill Ltd</i> ⁶⁹⁷ 7 May 1959. 5hrs. 45mins.</p> <p><i>Clifton Shipways Co Limited v Charles Lane</i> ⁶⁹⁸ 2 March 1960. 5hrs. 25mins.</p> <p><i>James Kinross v R H Tarrant</i> ⁶⁹⁹ 15 March 1960 8hrs.</p> <p><i>Sergeious Papa Michael v A K Koritsas</i> ⁷⁰⁰ 11 October 1961 5mins.</p> <p><i>Townsend Builders Ltd v France</i> ⁷⁰¹ visited the site and gave judgment on the 26 June 1962. [Case excluded because no time recorded]</p> <p>Average time: 4hrs. 49mins</p>
3. Single joint experts	2	<p><i>Leon v Beales</i> ⁷⁰² 8 Feb. 1962. 4hrs 21mins.</p> <p><i>Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and Nathan Bernard and Ruth Bernard</i> ⁷⁰³ 8 May 1962 5hrs. 7mins</p> <p>Average time: 4hrs 44mins</p>

⁶⁹⁵ J.116/1 *Minute Book No.4 Official Referees' Court 1959-1962* [Oct 2006 series: HPIM 1963] also: [CIMG 0160; and SH 101353]

⁶⁹⁶ J.116/1 *Official Referee's Minute Book. No. 4* p. 296. CIMG200

⁶⁹⁷ J.116/1 *Official Referee's Court Minute Book No 4* [Oct. 2006 series HPIM1964]

⁶⁹⁸ J.116/1 p.104. CIMG 0176 .

⁶⁹⁹ J.116/1. CIMG 0178 .

⁷⁰⁰ J.116/1. p. 207. CIMG 0190 .

⁷⁰¹ J.114/41. p.180. [Dec. 2006 Series CIMG 0638]

⁷⁰² J.116/1. p.. 245 7th February 1962.CIMG 192

⁷⁰³ J.116/1. CIMG 195 . Included only in Chapter 4 not Chapter 5 as most of proceedings outside two latter sub-division research periods.

4. Expert determination	0	
5. Experts and settlement	1	<i>John Fletcher Suter v W Pikta</i> ⁷⁰⁴ 7 June 1961 5hrs 13mins.
6. Proportional costs orders	1	<i>Shopfitting Centre Ltd v Revuelta</i> ⁷⁰⁵ 20 Dec. 1962. 1hr. 23mins. Average time for costs cases = 1 hr 23 mins*
7. Special pleadings	0	[*Not relevant to cumulative calculation]
8. Preliminary issues and questions	7	<i>Martin French v Kingswood Hill Ltd</i> ⁷⁰⁶ 6 May 1959 5hrs 45mins <i>George v Russell Bros (Paddington) Limited</i> ⁷⁰⁷ 1 Feb. 1960 17hrs 44mins <i>A.T. Chown & Co Ltd v Peter Davis Investments Limited</i> ⁷⁰⁸ 1hr 14mins <i>Edward Vernon Andrews v Greens (Wholesale China) Ltd</i> ⁷⁰⁹ 13hrs 5 mins 11 July 1960 <i>Lenton v City of Coventry</i> ⁷¹⁰ 5hrs 45mins 1 st Nov. 1960 <i>Parkwood Engineering Co Ltd v Carlington Engineering Ltd</i> ⁷¹¹ 6hrs 35mins <i>Sheering v Wisehill Field Company Ltd</i> 27 June 1962 ⁷¹² 7hrs. 56mins Average time: 5hrs 48mins
9. Convenient locale	2	<i>Harper and Preston Limited v Marshall Castings Limited</i> ⁷¹³ . Birmingham. 22 February 1961;

⁷⁰⁴ J.116/1. [CIMG 0188]

⁷⁰⁵ J.116/2 p.5.[Dec. 2006 Series SH 101775]

⁷⁰⁶ J.116/1 [Oct 2006 Series; HPIM 1964] and J.114/34 [SH 101355]

⁷⁰⁷ J.116/1 p. 96. [Oct 2006 Series; HPIM 2010]

⁷⁰⁸ J.116/1 p.290 [Oct 2006 Series; HPIM 2116]

⁷⁰⁹ J.116/1 p.126 [Oct 2006 Series; HPIM 2025]

⁷¹⁰ J.116/1 p.136 [Oct 2006 Series; HPIM 2030]

⁷¹¹ J.116/1 p.216 [Oct 2006 Series; HPIM 2072]

⁷¹² J.116/1 p.283 [Oct 2006 Series; HPIM 2113]

		<p style="text-align: right;">19hrs 3mins</p> <p><i>Barrow Brothers (Builders Lancaster) Limited v Haworth.</i> Lancaster District Registry. 3 December 1962⁷¹⁴. 15 mins</p> <p>[*Not relevant to cumulative calculation]</p>
Total	<p>20 cases</p> <p>17 net</p>	Average time: 4 hours 11 minutes

Sources; Data Collection: *Minute Book/Judges' Notebook* [1959-62] Data Analysis of Minute Books Nos. 4 & 5; Cases Not Recorded in Minute Books [1959-62]

⁷¹³ J.116/1 [CIMG184]

⁷¹⁴ J.116/1 p. 296. [CIMG200]

Table T. 5.41 Micro-caseflow management elements 1965-67

Type of case	Proportion of time (days) spent	
Case management devices	Number of instances	Actual time expended on case as recorded in <i>Minute Books No 5 and Court "C"</i> .
1. Early procedural evaluation	2	<p><i>Webbs Asphalt Roofing & Flooring Co Ltd v Roper & BRM Shopfronts (A Firm)</i>⁷¹⁵ 14 March 1966. 4hrs 10mins</p> <p><i>Leighton v Tait & Alt</i>⁷¹⁶ 31 October 1966 2hrs 35mins</p> <p>Average time for EPE cases: 3hrs 22mins</p>
2. Judicial intervention	2	<p><i>W J Barrs Limited v Thomas Foulkes</i>⁷¹⁷ 10 November 1965 5hrs 10mins</p> <p><i>Bickley v Dawson.</i>⁷¹⁸ 7 November 1966 15 mins</p> <p>Average time for JI case: 2hrs 43mins</p>
3. Single joint experts	0	No instances in this research period
4. Expert determination	0	
5. Experts and settlement	0	
6. Proportional costs orders	2	<p><i>Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties)</i>⁷¹⁹ 20 October 1967 174hrs 20mins</p> <p><i>Eaton Berry Ltd v King & Anor</i>⁷²⁰ 17 December 1965 10mins</p> <p>Average time for P.C. cases: (inapplicable)</p>
7. Special pleadings	0	
8. Preliminary issues and questions	7	<p><i>Middleton v Blackwell</i>⁷²¹ 16 June 1965 4 hrs</p> <p><i>Extol Engineering Ltd v The British Process Mounting Co (a firm) and Andrews Houseware Manufacturers Ltd</i>⁷²² 10hrs 45mins</p>

⁷¹⁵ J.116/3 [CIMG. 0106] and J114/48 p.1. [Dec 2006 Series CIMG 0592]

⁷¹⁶ J.116/3 p.189 [Oct 2006 Series: SH101091]

⁷¹⁷ J.116/3 [CIMG. 0102]

⁷¹⁸ J.116/3 p.191 [Oct 2006 Series: SH101092]

⁷¹⁹ J.116/3 p.193 [Oct 2006 Series: SH101093]

⁷²⁰ J.116/3 p.65 [Oct 2006 Series: SH101045]

⁷²¹ J.116/3 [CIMG. 0096]

⁷²² J.116/2 p.283. [Dec 2006 Series;SH101784] and J114/45 p. 210 [Dec 2006 Series CIMG 0736]

		<p><i>Frederick William Young v Charles William Connery</i>⁷²³ 25 March 1965. 7 hrs 35 mins</p> <p><i>United Dominions Trust (Commercial) Ltd v Thomas Gravell & Prized Steele Garage Ltd</i>⁷²⁴ 8 February 1966 4hrs 15mins</p> <p><i>K. Cross (Doncaster) Ltd v County Council of (East Riding)</i>⁷²⁵ 10 October 19 9hrs 20mins</p> <p><i>Olga Hilditch (Widow) v Charles E.H. Durham an L Durham (Married Woman)</i>⁷²⁶ 24 February 1967 10 mins</p> <p><i>Swallow Prams Limited v United Air Coil Limited</i> May 1967. 3hrs 55mins Average time for prelim cases: 6hrs.9mins</p>
9. Convenient locale	1	<p><i>Moresq Cleaners Limited v Hicks</i>⁷²⁸ 5 July 1966 in Truro. 10hrs 12 mins</p> <p>Average time: inapplicable</p>
Total case management time in the research period:	14	Average time: 3hrs 45 mins

Sources; Data Collection: *Minute Book/Judges' Notebook* [1965-67]; Cases Not Recorded in Minute Books [1965-67]

⁷²³ J.116/3 [Oct 2006 Series: SH101015]

⁷²⁴ J.116/3 p.99 [Oct 2006 Series: SH101055]

⁷²⁵ J.116/3 p.172 [Oct 2006 Series: SH101085]

⁷²⁶ J.116/4 p.19[Dec 2006 Series;SH101810]

⁷²⁷ J.116/4 p.35[Dec 2006 Series;SH101818]

⁷²⁸ J.116/3 [CIMG. 0110]

CHAPTER 6

THE IMPLEMENTATION OF MICRO-CASEFLOW MANAGEMENT

6.1 Synthesis of macro and micro-caseflow management

Having attempted to quantify the effectiveness of the court we now turn to consider two further questions. First, if the hypothesis that micro-caseflow management made a difference, as Newbolt intended, is to be explained, it is necessary to examine the relationship between the macro-objectives of the Judicature Commission and the micro-mechanics of the Newbolt “Scheme.” The latter has already been explored to some extent in Chapters 3, 4 and 5, but an examination of the objectives of those Commissioners⁷²⁹ and Newbolt is illuminating to set the hypothesis in context. We therefore consider what those objectives were, and what Newbolt had in common with the Commissioners, particularly, Lords Hatherly, Cairns and Selbourne? This essentially entails a comparison of macro-management objectives by the superior judiciary, and micro-management aims of the referees.

Second, it is useful to consider the nature of the referees’ subordinate jurisdiction which permitted the referees to act more informally at times.

6.1.1 Macro-caseflow management level

A macro-analysis is important here because it puts in context the subordinate role of the referee. Such subservience enabled the referee by more informal means to resolve cases. It is arguable that had Newbolt and his colleagues had a higher status Newbolt might never have attempted his experiments in chambers.

In this context it is very important to be reminded of the origin of this species which was best summarised by Brett, J. in *Cruikshank v The Floating Swimming Baths Company*⁷³⁰ supported by the reasoned judgments of Coleridge, C.J. and Lindley, J. In that case Brett said that since the Judicature Act, the decision of an arbitrator was open to revision by the Court upon the arbitrator making a report so that the Court could inquire into any alleged miscarriage by the arbitrator. He explained that there were two forms of process. The former practice at Common Law was that a common-law Court, by consent of the parties, had power to refer the case to a master or an arbitrator by

⁷²⁹ The particular contributions of the principal architects of the office the three Lord Chancellors: Selbourne, Hatherly and Cairns were considered in Chapter 2

⁷³⁰ (1876) 1. C.P. 260 at 263.

consent or by order. Such a reference could only be for a final decision. There was no power to refer a case for inquiry and report.

In the Chancery courts the practice was to refer a question (which might be of all the questions in a cause) to the chief clerk or other officer, for report. The Court, upon the report of the referee considered his findings, and thereupon pronounced a decree.

Change came about when the Judicature Act and new procedural rules were enacted with the object of making the procedure uniform across the Divisions. It was unnecessary for this purpose to take away the power of ordering a cause to be referred for decision at Common Law, but according to Brett, J. it appears that a power was required to refer questions or causes for a report by the referee if the court were to decide the case.

Brett went onto explain this in the context of the Common Law Procedure Act and the Judicature Act read together. He explained that:⁷³¹

There are two kinds of reference. One is a reference to the cause for decision, it does not follow that no part of the Judicature Act or Rules applies to such a reference....

The reference is one under the Common Law Procedure Act and Judicature Act taken together, and the rules of the latter as to pleading, evidence, summoning witnesses etc will be applicable to such a reference, but if the reference is for decision, I think the old law applies; and the decision of the arbitrator is final, unless a defect appears on the face of the award. The other kind of reference which the common law Divisions are empowered by the Act to make is a reference of one or more question or questions in the cause or all the questions in the cause, or, if you please so to call it, of the cause itself, for report by the arbitrator. With respect to this class of reference, my present impression is that the Court may review the report and the findings of the arbitrator, either in respect of law or fact....

In this case Brett, J. was of the view that the reference was for a decision and consequently the court could not review it. Coleridge, C.J. agreed with that course as did Lindley, J. who put the point more concisely:

If the reference is for report, the report may be reviewed; if it is for decision, the decision is final, just as before the Act⁷³²

This extract is critical to our understanding of the referees' role. The reference to the arbitrator and the Chancery master indicate that the new office of referee was not to be a reincarnation of the County Court judge, or a new type of High Court judge. He was, as suggested, a hybrid judicial officer with flexible functions to resolve particularly complex cases. It may be said that the motives and aspirations of Cairns and Selbourne were conditioned by the pressures on a judiciary working in an antiquated procedural

⁷³¹ (1876) 1. C.P. 260 at 263.

⁷³² Judicature Act 1873.

environment in a medieval setting.⁷³³ They were giving limited effect to utilitarian principles of maximisation of resources and efficiency in: amalgamating the separate legal and equitable jurisdictions; uniting the many divided courts and jurisdictions in one Supreme Court of Justice; and providing cheapness, simplicity and uniformity of procedure. That utilitarian objective is the common link here between Newbolt and the Judicature Commissioners. What led Newbolt to invent his “Scheme” was the expenditure of time and cost, and the necessity for expedition and economy. Newbolt’s objective therefore was the same as that of the Lord Chancellor who in introducing the Judicature Bill into Parliament declared that:

public officers to be entitled "Official Referees" should be attached to the court to deal with cases of this kind, and to whom such cases should be sent at once without the useless expensive form of a jury trial.⁷³⁴

The Commissioners sought to avoid the unpopularity of arbitration as well as civil jury trials. It was said in those times that arbitrators regulated their own fees and that:

The result is great and unnecessary delay, and vast increase of expense to suitors.⁷³⁵

Again, one can compare that with Newbolt and his remarkable report to the Lord Chancellor in July 1920 where he states:

From the legal and logical point of view, indeed from almost any point of view, a lay arbitration is open to the gravest objections. Whenever a motion to set aside an award is made gross irregularities, often amounting to a denial of justice, are disclosed. These are well known, and indeed not enlarged upon, but the fact remains that the attraction of a cheap and speedy decision is so great that more important matters are overlooked.⁷³⁶

Quite apart from cost, Newbolt must also have been aware that the referee’s office was intended to be flexible by referees hearing matters of account, and enquiry and report. These met the objective of the Judicature Commission. They provided a system of tribunals adapted to the trial of all classes of cases and being “capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried.” It is interesting to consider precisely what the Commissioners meant by that. One view is that the court could adjust the procedural rights of the parties. Newbolt pioneered this, but subject to the parties’ consent. This may have been adopted from the

⁷³³ The Great Hall at the Palace of Westminster was the home of the courts before the Law Courts were opened in the Strand.

⁷³⁴ H.C. Deb. Vol. CCV col. 346 13th February 1873

⁷³⁵ n.4. p.13.

⁷³⁶ LCO 4/152 [HPIM 561]

practice of arbitrators to extend and adjust the referees' procedural powers which have been described.

Contrast the Commission's objective with Newbolt's imperative:

The first question then is how the present procedure can be cheapened and accelerated.⁷³⁷

And later when Newbolt wrote:

I only desire to add that in my scheme for cheapening and expediting litigation nothing is done without consent. This by *friendly business discussions* over the table simplification is effected.⁷³⁸

I have devised means of enabling the parties to have their disputes decided cheaply and rapidly and my efforts in this direction have been widely approved by the profession....⁷³⁹

Newbolt and his colleagues were struggling with a Victorian system of a bygone era with a strict adherence to a culture of *stare decisis* and a policy of "formalism" where judges at first instance were discouraged from any radical tendencies. Surprisingly there were common objectives the only difference being that the Judicature Commission was operating at macro-level to Newbolt's micro level of management.

Having considered Newbolt's era in chapter 3 and part of the post-war era in chapter 4, it is useful to consider in more depth the type of subordinate jurisdiction which was said by Burrows to have been phased out. Although Evershed considered it an important part of the referee's jurisdiction. The following case analyses have been extracted from the referees notebooks of those times 1947-60.

6.1.2. Subordinate jurisdiction as a facet of macro-caseflow management

Mr Burrows' contention in his seminal article in the *Law Quarterly Review*⁷⁴⁰ that the referees were no longer mere assessors of damages and they did not take accounts, but were occupied in "... trying a large number of non-jury actions and doing the work as a High Court judge" is not sustained. A few examples from the referees' notebooks and records will suffice to demonstrate that this was not quite accurate.

On the 11 April 1960 Cloutman sent a long Memorandum to Sir George Coldstream, the Lord Chancellor's Permanent Secretary. In it he referred to the *Second Interim Report of the Committee on Supreme Court Practice and Procedure* presented to Parliament in March 1954.⁷⁴¹ He argued that ever since *Dunkirk Colliery v Lever*,⁷⁴²

⁷³⁷ LCO 4/152[HPIM 561]

⁷³⁸ Author's italics.

⁷³⁹ LCO 4/152 [HPIM 0582] Undated. On file after July 1921 correspondence.

⁷⁴⁰ n.15.

⁷⁴¹ 2/7739 [HPIM 0813]. *The Official Referees*. Memorandum of Sir Brett Cloutman V.C., QC agreed with Walker Kelly Carter and Percy Lamb.

where the referee was required to give reasons for his decision the role of the referee had become more difficult.⁷⁴³ He wrote:

Today, an Official Referee is required to try involved cases in contract which are unsuitable for the non-jury list because of the voluminous particulars and schedules involved. He deals with those cases throughout their interlocutory stages. The cases are long, the trials say take one or two months or longer and the judgments will deal with both fact and law, with the same particularity as the cases have received from their inception. Because of the nature of these cases, a severe restriction upon the right of appeal is accepted without question, although the sums involved are often exceedingly large. (RSC Order 36a Rules 1 ?4 and 6).

Accordingly for this class of work this Jurisdiction of the Official Referee is precisely that of a Judge (Order 36a. r.7), and to suggest today that he should not give his reasons is inconceivable.⁷⁴⁴

Taking Burrows' point Cloutman wrote:

The truth is that for half a century or more he has not been a referee at all, but a judge of the heaviest cases in contract.

Cloutman says that the referee at this time and for half a century had been in effect "a judge of the heaviest cases in contract." This can be tested against research in this era. Taking Cloutman's term of office, 1948-63, the evidence of the judges' notebooks does not always support this view. In the early post-war research period the cases could not be described as "the heaviest" and cannot be equated with the heavier cases referred to referees in the later part of the 20th century save for a few exceptional referrals such as *Westheath Contractors v Borough of Grantham* heard in March 1945 concerning 169 building units comprising 63 dwellings.⁷⁴⁵

6.1.3 Aspects of subordinate jurisdiction

The trend towards much more complex cases in the construction field really starts after 1963 when the R.I.B.A. published its new form of contract containing clauses which the House of Lords in *Bickerton v Northwest Metropolitan Hospital Board*⁷⁴⁶ condemned (per Lord Reid) in saying:

.....the latest edition of the contract, the position reflects no credit on the RIBA..... I return to my earlier criticism of the form of contract and emphasise that it seems lamentable that such a form used to govern so many and such important activities throughout the country, should be so deviously drafted with what in parts can only be a calculated lack of forthright clarity.

In the same case, Dankwerts L.J., said

⁷⁴² 1878 9 Ch D 25 Bramwell, J., judgment.

⁷⁴³ 2/7739 [HPIM 0813] *The Official Referees*. Memorandum.

⁷⁴⁴ LCO 2/7739 [HPIM 0814]

⁷⁴⁵ J.114/3 *T. Eastham K.C Official Referee's Notebook 1946-1948* [IMA 0032]

⁷⁴⁶ *Bickerton v Northwest Metropolitan Hospital Board*. [1970] 1 W.L.R. 607; 1 ALL E.R. 977 at pp.979, 989

It was a new form:Unfortunately for this Court, it has produced problems which have given this Court as well as other Courts in the past, difficulties of interpretation which defied the experienced intelligence of the Counsel concerned with these matters and even more the efforts of the Courts concerned, to give a reasonable and clear meaning to the terms of the contract.

This study has shown little evidence of highly complex building cases and difficult matters of interpretation in the referee notebooks: only in the case files after 1960 is this evident. Mr Burrows' contention in his seminal article in the *Law Quarterly Review*⁷⁴⁷ that the referees were no longer mere assessors of damages and they did not take accounts, but were occupied in "... trying a large number of non-jury actions and doing the work as a High Court judge" is not entirely sustained as we find below.

(a) Matters of Enquiry and Report

*Re: a Lease of St Martins Theatre London WC2 and re Landlord and Tenant Act 1954 Bright Enterprise Ltd v Right Honourable Lord Willoughby de Burke*⁷⁴⁸ was a matter for enquiry and report with R E Megarry QC appearing on behalf of the applicants which heard evidence from expert surveyors and engineers as to the state of the theatre and compliance with L.C.C. entertainments regulations. Other cases included: *British Electric Traction Co Ltd v Thomas Edwin Langton and Luxury Land Cruises Limited*⁷⁴⁹ heard on Monday 7 December 1959, John Megaw appearing for the Plaintiff, and *Titler v Brown & Another*⁷⁵⁰ a matter referred from the Chancery Division on 26 March 1956 for enquiry and report as to a dispute over livestock.

(b) Actions on an Account

G Swindon & Co Ltd v William Franklin Stirling Car Hire Services Limited, Launderette (High Road) Limited, Launderette (Boreham Wood) Limited,⁷⁵¹ was an action on the account heard on the 19 November 1959 Lewis Hawser and Mr Trapnell appeared for the parties, both later became referees. Another example was *Mory & Co Limited v Regan Brothers (Haulage) Limited*⁷⁵² involving three issues: a matter of accounting, a counterclaim for negligence and the detention by the plaintiff of a trailer. *Butler v Vaughan* was a matter of account determined on preliminary issues.⁷⁵³ *Newbold*

⁷⁴⁷ n.15 p. 509.

⁷⁴⁸ J.116/1 [CIMG 0163]

⁷⁴⁹ J.116/1 [CIMG 0169]

⁷⁵⁰ J.114/35 [CIMG 0089]

⁷⁵¹ J.116/1 [CIMG 0168]

⁷⁵² J.116/3 [CIMG 0098]

⁷⁵³ J.114/35 [HPIM 2780].

*v George Davies (Haulage) Limited*⁷⁵⁴ is further evidence that the referees were still dealing with matters of account in the mid-1960s and at local venues. Here Carter sat at the Nottingham County Court. There is also further illustration of this inferior jurisdiction in the court file of *Alexander Angell Limited v F C Pilbeam (Male)*⁷⁵⁵ a claim for £1,672 3s 5d in respect of the sale to the defendants of diverse quantities of pullets which suffered from coccidiosis caused by various parasitic protozoa.⁷⁵⁶ On the 11 June 1968 the court served notice on the parties stating:

any likelihood of a settlement or re-estimation of the length of trial should be communicated immediately.

It was signed by the clerk to Percy Lamb QC⁷⁵⁷ The case illustrates two features. First, this is not a traditional construction case but a contractual dispute over livestock. Second, as soon as the case is effectively transferred the referee case manages the matter.

(c) Offences under the Defence (General Regulations) 1939 or the War Damage Act 1946

The referees undertook a considerable amount of work generated by wartime legislation whether under the Defence (General Regulations) 1939, or the War Damage Act 1946. During and after the war the court had residual jurisdiction in cases under the Defence (General Regulations) 1939 for building works requiring licenses.⁷⁵⁸ Few of these cases are reported in the Law Reports but there are three cases that appear to fit the above descriptions.

The first of these *Woolfe v Wexler* is a typical case where the building works were illegal under the Defence (General) Regulations 1939, Regulation 56a.⁷⁵⁹ In that case the builder was entitled to the cost of labour and materials because the works were not illegal as the person paying for the work was not the recipient of the licence. In *Audley Land Company Ltd v Kendall* the referee required a court expert to deal with questions arising from a Scott Schedule. In excess of the referee's instructions the expert volunteered further opinion which the referee excluded.⁷⁶⁰ Another example is *Strongman v Sincock* heard on 12 July 1955 where an architect acquired two licences

⁷⁵⁴ J.116/3 [CIMG 0108]

⁷⁵⁵ J.115/28 [CIMG 0117].

⁷⁵⁶ Especially of the genus affecting the intestines; it is mainly a disease affecting the animal's muscles.

⁷⁵⁷ J.115/28 [CIMG 0124].

⁷⁵⁸ J.114/14 [CIMG 0091 and CIMG 0092] 8 May 1950

⁷⁵⁹ Court of Appeal, 21 February 1951 [1951] 2 KB154

⁷⁶⁰ [1955] 1 W.L.R. 639

for building work.⁷⁶¹ The licences were held to be illegal and consequently the builder sued the architect on the architect's implied warranty to pay for the work. This type of work appears to have formed a significant and important part of the referees' jurisdiction in the late 1940s, and in the 1950s.

(d) Assessment of Damages

Sydney Smith Black Mobile Coaches Limited v J F Anderson (Male) provides an early example of an assessment of damages claim for the negligent repair of a Rover car. Here the referee awarded damages because the engine had been re-bored up to the recommended limit and a new cylinder block should have been obtained.⁷⁶² In *Jays (Engineers) Ltd v Hobb Good Limited*, heard on the 31st January 1949, the referee had to assess damages for 101 defective frames pursuant to a referral for assessment from the Court of Appeal. Finally, *M & L Transport (a firm) v Horricks*⁷⁶³ was an action started in 1957. The trial was held on 11 January 1960 to assess damages. This case proves that such referrals continued up to the 1960s.

There are other references in Eastham's first notebook which also confirm the subordinate role of this court but do not fit the above categories. They include retail trade cases such as *Superclothing Company Limited v John Betty*,⁷⁶⁴ concerning badly made suits sold at discount. Another case *D N L Stepgamy Limited v Millicent (Birmingham) Limited*⁷⁶⁵ involved the sale of inferior quality dresses and entitlement to repudiate the contract of sale. Another was *La Planche v Newman*. This was a claim for commission on the sale of motor car. It concerned the failure to deliver 500 vehicles on order since May 1948 still not delivered in March 1952.⁷⁶⁶

These cases were neither complex nor did they pose difficult questions of interpretation.

6.1.4 Conclusions as to subordinate jurisdiction

What we establish here is that despite Burrows and Cloutman suggesting that the referees' jurisdiction was something greater than a referral jurisdiction the referees retained a subordinate jurisdiction as the Judicature Commissioners had intended. The Evershed Report appears to have affirmed that position.⁷⁶⁷ What was different was the

⁷⁶¹ [1955]2 Q B 525

⁷⁶² J.114/4 [CIMG 0058] 2 March 1948.

⁷⁶³ J.116/1 [CIMG0170]

⁷⁶⁴ J.114/1

⁷⁶⁵ J.114/14 p.247. 8 May 1950 [CIMG 0089]

⁷⁶⁶ J.114/21 p. 184 [CIMG0068-0070]

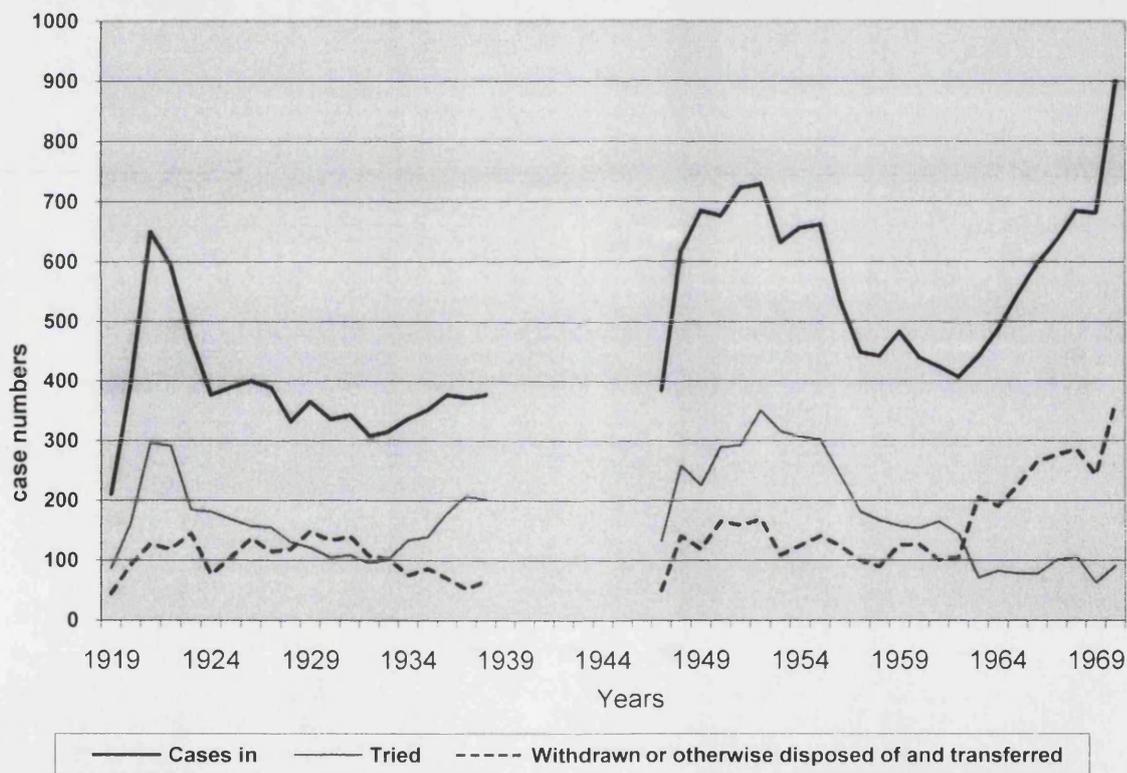
⁷⁶⁷ n.38 at p.40 paragraph 109.

nature of the referrals which became increasingly more complex on the construction side and the wide variety of subject matter. This may be demonstrated further by the following analysis on caseload management.

6.2. Evaluating contradictory trends and results of the two periods

Having recognised the particular status and place of the court in the legal system, and taken note of the advantage of a subordinate judiciary in terms of Newbolt’s informal “Scheme,” it is possible to take an overview of the effectiveness of the “Scheme” its survival. This is illustrated In Chart C.6.1, the Overall Comparison chart, below.⁷⁶⁸ We can then better understand the success of the Judicature Commissioners’ invention in terms of the backlog this work might otherwise have produced in the Chancery and Queen’s Bench Divisions.

Chart C.6.1 Overall comparison



Source: *Civil Judicial Statistics Analysis: Official Referees: 1919-70*

⁷⁶⁸ n. 51 Line 39.

Referee Case Management 1919-70

(a) Pre-war period

Chart C.6.1 indicates a corresponding upward trend in workflow to the court in the early part of the pre-war period 1919-22. Referrals and trials increased threefold: referrals from 210 in 1919, to 649 in 1921, and trials from 86 in 1919 to 291 in 1921. To meet such a challenge, Newbolt and his colleagues had little choice other than to experiment with more effective means.

Here we find that trials and settlements follow a relatively similar pattern in the early years up to 1932, but then trial rates appear to increase and settlement rates diminish. In fact, 1932 appears to be the year when the flow rates matched and then diverged. By contrast we also see that there were 96 trials in 1932, and 202 in 1938, an increase of 210 per cent. In 1932, 107 cases were resolved before trial compared with 63 in 1938, a reduction of almost a half.⁷⁶⁹ This corroborates our earlier findings using Formulae in Chapter 5 and supports the hypothesis in favour of the efficiency of Newbolt's "Scheme" in terms of earlier settlement.

(b) Post-war period

Chart C 6.1 indicates that the pre-war trend is reversed after the war in terms of numbers of cases disposed before trial, and the number of cases tried. In the pre-war period from 1932 the chart demonstrates that whilst the number of disposals before trial (settlements) declined trials increased. The reverse phenomenon is partially true of the post-war period. From the time of Richards' appointment in 1962, trial rates decreased whilst settlements and disposals increased indicating a more efficient court than in Newbolt's time. Such an impression is not supported because the backlog rates increased considerably as we shall see after 1963.⁷⁷⁰

We further note from Chart C.6.1 an initial steep rise in referrals, trials and settlements; this is followed by a short period of decline in 1952-61, and in turn followed by a further increase in business to a high point in 1952. There is then a sharp decline in referrals between 1952 and 1953, a slight rise to 1955, followed by a two year decline to 1957. There is a further increase in business for the next two years to 1959, but thereafter a slump to 1962, followed by a sharp rise in referrals which continues to 1970.

⁷⁶⁹ 59%.

⁷⁷⁰ See: Chart C.6.3

(c) Comparative Analysis

Having considered this it is appropriate to consider the two periods comparing them at their most effective. For this purpose, here we select years 1919 and 1923 and 1962 and 1970 because they represent the most efficient phase of each period.

Table T. 6.1 Newbolt/Richards Comparison

	1919	1923	Percentage Increase
Referrals	210	470	224%
Settlement	44	144	327%

	1962	1970	Percentage Increase
Referrals	407	902	222%
Settlements	90	329	366%

Source: Civil Judicial Statistics Analysis: Official Referees: 1919-70.

If we take the years 1919 and 1923, referrals increased from 210 in 1919 to 470 in 1923, an increase of 224 per cent. In the same period settlements increased from 44 in 1919 to 144 in 1923, an increase of 327 per cent. By contrast, if we then take the years 1962 and 1970, referrals increased from 407 cases in 1962 to 902 cases in 1970, an increase of 222 per cent. In that same period, settlements increased from 90 to 329, an increase of 366 per cent.

We find here a very close comparison between Richards, Percy Lamb and Carter who just beat the court of Pollock Newbolt and Scott. It is contended here that the reason for this high level of settlement and efficiency was due to Newbolt's and Richards⁷⁷¹ respective approaches to micro-caseflow management. We subsequently consider the effect of the backlog which may alter our view on efficiency in these periods.⁷⁷²

6.2.1. Significance of the "Scheme"

Whilst the Commissioners were anxious to reduce the list by referring complex technical matters to referees, Newbolt wanted to augment the process in his use of experts as described in his reports to the Lord Chancellor. The dilemma in 1873 and 1876 had been to reduce the backlog in the lists and relieve overworked judges because in those two years there was an increase of 53 per cent in Chancery from 301 cases to

⁷⁷¹ Lord Salmon in his tribute to Norman Richards said: "Norman had a genius for recognising what really mattered and never overlooked what did. He also had a pronounced distaste for the modern tendency of wasting much time and money in probing the irrelevant." *The Times* 17 January 1978 p.17 Issue 60212; col. E.

⁷⁷² Paragraph 6.2.4 and Charts C. 6.2 and C. 6.3

566 making an average annual increase of 27per cent. The comparison with the critical years of this research highlights the point very simply, the common denominator being lack of manpower. Just as the senior judiciary were required to invent a subordinate judicial post to alleviate the pressure on the High Court list at a macro-case management level, so the referees in the early 1920s were required to innovate at the micro-case management level. The pressure on the High Court non-jury list can be demonstrated by the tripling of cases referred to the referees in the years 1919-21:

Table T. 6.2 Referral influx 1919-21

Year	1919	1920	1921
No. of referrals	210	393	649

Source: Civil Judicial Statistics 1919-21

6.2.2 Effectiveness of the “Scheme”

Whilst it has not been possible to find any contemporary diaries, or notebooks from Newbolt’s time, quantitative analysis in Chapter 5 and here has been possible by reason of *Civil Judicial Statistics*. A fundamental question in this thesis is, whether the invention and evolution of a rudimentary caseload management and consensual interlocutory process made referees more efficient. That has been determined to an extent in Chapters 3, 4, and 5, and has been further considered above in Chart C.6.1. The formulae analysis in Chapter 5 showed us that the Newbolt era was slightly more efficient in terms of disposals and trials. Newbolt’s court also appears to have a higher percentile average applying Formula A; a higher percentage of cases tried to cases brought in applying Formula B in the difficult period 1932-38 when the court was understaffed (the converse of what is described below in relation to settlement rate) and a higher overall percentage of cases tried to cases referred applying Formula C.

Taking the period 1928-31 as the best period of settlement in the Newbolt era the rates of settlement are:

Table T. 6.3 Rates of disposal before trial 1928-31

1928	1929	1930	1931
36%	41%	40%	41%

Source: Civil Judicial Statistics Analysis: Official Referees: 1919-70. Line: 39K-39N

Whilst the average rate of disposals to referrals in Newbolt’s 17 years in office was 33 per cent, that average rate was exceeded in the 4-year period in Table T.6.3 to 40 per cent.

Table T. 6.4 Rates of disposal before trial 1963-66

1963	1964	1965	1966
41%	32%	37%	37%

Source: Civil Judicial Statistics Analysis: Official Referees: 1919-70 Line:39AT-39AW

Table T.6.4 demonstrates that such an efficient rate was not matched until the early 1960s, 1963 being the best year in terms of a 41 per cent rate of disposal before trial. The average rate of settlement in that period was 37 per cent.

It may be concluded here that if Newbolt was the inventor of rudimentary micro-caseflow management then Richards was its promoter who ensured its survival.

6.2.3 General conclusions

Newbolt's attainments must be considered in the light of a fairly sharp decline in disposal rates in the years following 1931. The rate of settlement in the years 1932-38 averaged a rate of 23 per cent, as against the 27 per cent average for the period 1919-38. In this case it is likely that the court could not cope with the influx of cases with only two referees in post.

Hansell retired from the court in 1931 which left Newbolt and Scott. Scott retired in 1933 and was replaced by Pittman.

Pittman and Newbolt were in post until 1936 when Newbolt retired. Eastham replaced Newbolt that year.

Thus, in the period 1932-38 the referees were one judge short of their quota of 3 judges. This may account for the decline in settlements.

However, Newbolt's achievements when compared to his immediate successors were still greater. Although there were 4 referees in post in the period 1947-62 they did not equal Newbolt's record for the disposal of cases before trial. In this post-war period, 1947-62, the average settlement rate was 16 per cent. Whilst this seems less proficient, account must be taken of the increased workload following the war. Between 1932 and 1936, the less efficient part of Newbolt's tenure, 2,439 cases were referred to the court, an annual average of 348 cases per year. Between 1947 and 1962, 8,955 cases were referred, an annual average of 560 cases per year. This represents an increase of 38 per cent in terms of annual caseload compared to the earlier period. This increase after the war meant that each judge was responsible for an average of 140 cases in the Eastham-Carter period.

By contrast in the Newbolt period, each judge had been responsible for an average of 174 cases so that the pressures on Newbolt and his colleagues were greater in terms of numbers. There is some direct contemporaneous evidence in the notebooks and pleadings files reviewed in Chapter 4 that cases were becoming more complex in that second phase and this may account for the variation in this analysis. Perhaps Newbolt's legacy was written in the *Final Report of the Supreme Court Committee on Practice and Procedure* which embodied much of the experience of Newbolt and Eastham and extended the Judicature Act 1873 definition as to the court's jurisdiction by reference to "the interests of expedition, economy or convenience or otherwise."⁷⁷³

6.2.4 Analysis of backlog

We may recall that in chapter 5 we considered the effect of the backlog on this rudimentary form of micro-caseflow management. We concluded at paragraph 5.3.3 that the referees in Newbolt's time were able to keep the backlog under control to the extent of a third of their average annual caseload. After the war the backlog became more difficult to reduce and between 1948 and 1970 stood at about two-fifths of the average annual caseload.⁷⁷⁴ In paragraph 5.4.2 we noted that before the war each referee had an average backlog of 40 cases, and after the war each had a backlog of 76 cases on average—a 90 per cent rise. In Table T.5.11 we noted an average backlog of 144 cases per referee before the war compared with a post-war average of 176 cases per referee. Finally at paragraph 5.4.3 (b) we found an average backlog rate of 32 per cent before the war and 39 per cent after.

(a) Backlog at the beginning and end of the year

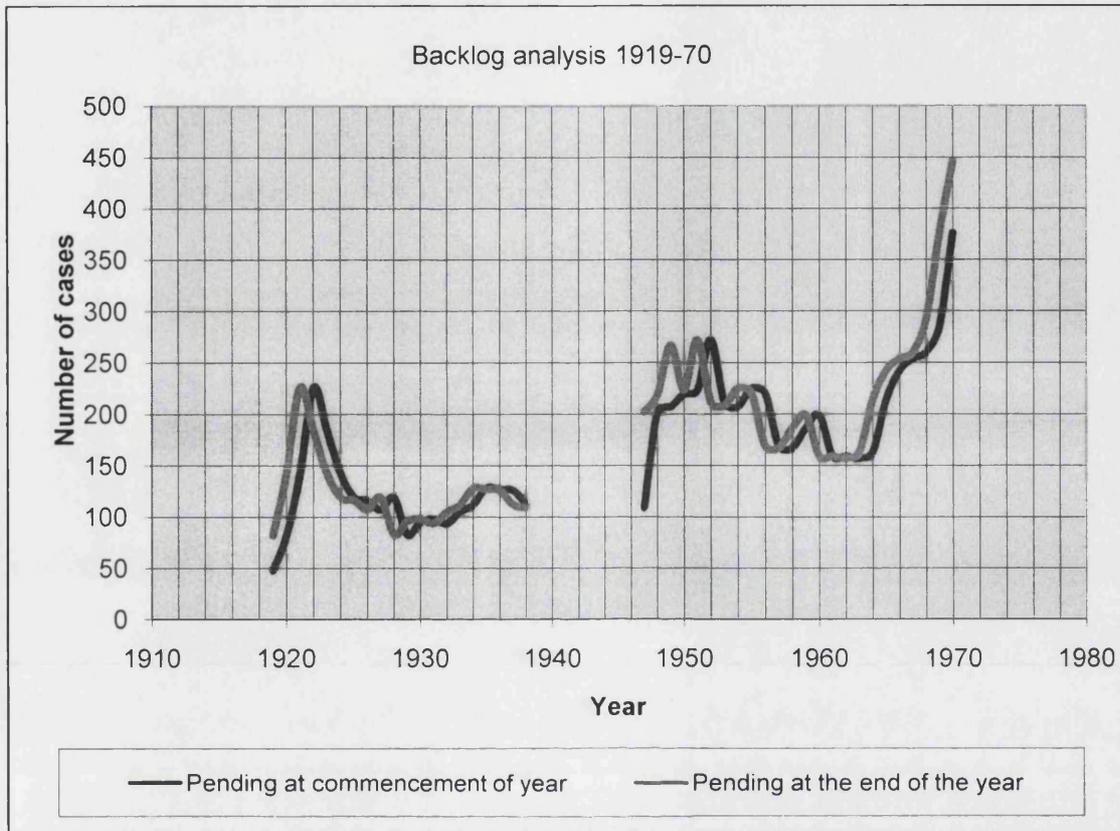
The basis of our quantitative analysis of the backlog in chapter 5 was the backlog of cases pending at the end of the year. This was taken because those were the cases that were not heard in that year. *Civil Judicial Statistics* provide the number of cases pending at the beginning and the end of the year. Consequently, we may compare this data at the beginning and end of each year. This may indicate the efficiency of the court in dealing with the backlog. It is also interesting for us to note trends in the application of the formulae in chapter 5 to see whether the earlier trends correspond with these findings.

⁷⁷³ n.22. Paragraphs 107,108.

⁷⁷⁴ See: Table T 5.4.

Taking therefore the Spreadsheet⁷⁷⁵ we can extract the data to produce Chart C.6.2 backlog analysis below:

Chart C.6.2



Source: *Civil Judicial Statistics Analysis: Official Referees: 1919-70*

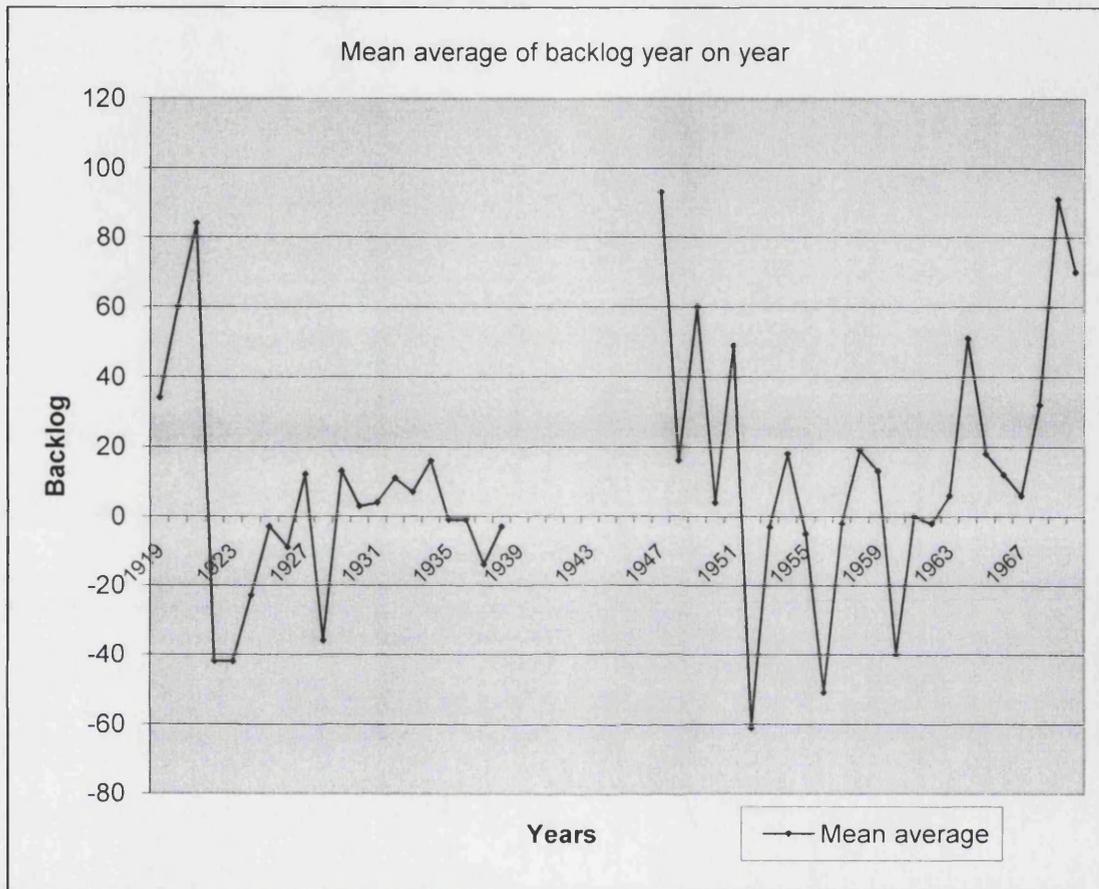
Chart C. 6.2 illustrates that from 1919 to 1922 the referees had difficulty coping with the heavy inflow of cases from the Queen’s Bench non-jury list. But between 1923 and 1937 they managed to keep the backlog below 150 cases. After the war there is a similar situation but in the early 1960s the backlog at the end of the year continuously rises.

⁷⁷⁵ n. 51 Lines: 6B-6U and 6 AD - 6 BA, and 16B-16U and 16AD-16BB.

(b) Closer analysis of the backlog

A better understanding may be obtained from Chart C 6.3 which gives a closer look at the backlog figures.

Chart C.6.3.



Source: Civil Judicial Statistics 1919-38 and 1947-70

Here the line graph above the *x* axis denotes an increase in the backlog and the line below a reduction. We can see that in the early years when Newbolt reported to the Lord Chancellor about his caseload techniques the graph line appears below the *x* axis. By reference to the Backlog Analysis Spreadsheet⁷⁷⁶ we can see reductions of 42 cases in 1923 and 1924, 23 in 1924; 3 in 1925, 9 in 1926; 36 in 1928 and 1 in 1935. The reduction in 1922-23, 1924 and 1928 may have some bearing on Newbolt's exercise of caseload processes but it is difficult otherwise to find a very marked effect.

⁷⁷⁶ n.51 and Backlog Analysis 1919-70 (Appendix)

After the war the earlier formulae results appear to be supported with the exception of three reductions in the backlog in 1952 of 61 cases; in 1956 of 51 cases; and in 1960 of 40 cases.

(c) Observations

The problem with the theory of micro-caseflow management is that whilst it appears to have reduced trial times and increased disposal rates before trial it did not prevent an increasing backlog. This backlog in the early to late 1960s was higher than the number of referrals and to that extent made the court inefficient. The obvious reason was the enormous increase in referrals especially between 1960 and 1970 and the fact that there were just 3 referees in post. The other reasons lie in the types of case being referred and the increasing complexity of building cases after 1963 when the Joint Contracts Tribunal published its new version of the RIBA building contract.⁷⁷⁷ The form itself demonstrates the increasing complexity of such cases. The question, however, can only be approached from an analysis of the type of case that entered the list in the context of the statistical analyses advanced in chapter 5 and whether it is possible to achieve some understanding of what was causing the backlog and why caseflow management could not, of itself, deal with the problem.

To understand what may have been increasing the backlog or causing it, analysis of case type is essential. The case types have been analysed in respect of the two latter post war research periods 1959-62 and 1965-1967. The period, 1947-1959, has also been examined in chapter 4 to consider why cases were taking longer despite some evidence of the usage of micro-caseflow management.

One of the difficulties is that the numbers of officeholders fluctuated in the pre and post-war eras. The referees were recruited from the ranks of leading counsel some without previous experience of the referees' court. Most were not scientific men or mathematicians, and found the job tedious. Others were not employed full-time but were deputies, especially in the post-war period.

Manpower was difficult because of Treasury limitations so that the minimum of four was not realised until after the war. In that time, Hansell replaced Pollock in 1927, and was not replaced when he retired. Newbolt was replaced by Eastham in 1937. Between 1932 and 1942 there were only 2 referees in post. In the post-war era there were 3 referees in post from 1942-47. From 1948-56 there were 4 referees in post, but only 3

⁷⁷⁷ Royal Institute of British Architects.

between 1957 and 1970, transition being achieved by Carter replacing Eastham in 1954; Percy Lamb replacing Caswell in 1959; Richards replacing Cloutman in 1963 and Stabb replacing Percy Lamb in 1969.

In chapters 3 and 4 we noted from the analysis and study of Eastham's cases a gradual increase in jurisdiction, both in terms of quantity of cases and complexity.⁷⁷⁸ We noted the particular complexity of construction cases which after the war comprised mostly cases of dilapidations and War Damage Act claims. Within a few years however such cases were becoming more time consuming with the use of Standard Form Contracts and builders complex pricing and valuation aspects involving quantity surveyors who became specialists in construction claims work. The referees also engaged in other technically complex work such as salvage claims. Whilst the cases tended to become more complex, for decades the referee still remained a court of referral and dealt with other technical matters although a large number were of low value. Chapter 4's qualitative analysis and literature review of the judicial records demonstrates the complexity of some cases on the one hand, and the relatively low value on the other. This is supported also by the evidence contained in the Data Collection.⁷⁷⁹ Despite such cases being of lesser value, the increasing number of referrals and their variety would appear to be the main cause of the build up of backlog in the 1960s.

6.3 Referee micro-caseflow management overview

Here we examine factors which challenged the viability of caseflow management.

6.3.1 The backlog problem

Having calculated the average backlog of cases for each referee in Table T.5.4, and having calculated the average backlog percentage from the formula at paragraph 5.3.3, we may conclude that an average pre and post-war backlog percentage is:

$$32\%+39\% \div 2=36\%$$

We can therefore take this as an overall percentage of backlog to referrals in the whole research period or an average backlog of 52 cases per referee per year. In the period 1944–60 *Judicial Statistics* illustrate a fluctuating backlog. This has been further illustrated in Chart C 6.3 above. Chart C 6.1 being an overall comparison of cases

⁷⁷⁸ See: Appendix: Data Collection: *Minute Book/Judges' Notebook Analysis* [1959-62] as an efficiency demonstration; Data Analysis of Minute Books Nos. 4 & 5; Cases Not Recorded in Minute Books [1959-62]; Data Collection: *Minute Book/Judges' Notebook Analysis* [1965-67]; Cases Not Recorded in Minute Books [1965-67]

⁷⁷⁹ n. 778 Appendix Data Collection.

brought in, tried and disposed of, illustrating a backlog between 1947 and 1960, varying from 200 cases in 1947 (i.e. 80 per cent of the 248 cases referred) to 159 cases in 1960 (i.e. 65 per cent of 241 referrals made). This indicates an overall improvement in the backlog by 15 per cent on the basis that the backlog in 1947 was 80 per cent of the referrals and in 1960, 65 per cent of the referrals.

6.3.2. Possible effect of micro caseflow management

The question is what was causing this improvement? Was it due to micro caseflow management technique or some other factors? The highest years of backlog in this period were 1949 with 267 cases, and 1951 with 272 cases.⁷⁸⁰ These figures correspond with the two highest recorded rates of referrals. In 1949, there were 468 referrals, and in 1950, 501 referrals.

The rates of referral do not come within this range again until 1970 when there were 525 referrals against a backlog in that year of 446 cases. The difficulty here of managing the case flow appears to be one of quantity and not complexity. A study of J114/5 and 6 in the period 1947–49, for example, indicates an influx of War Damage Act claims and it appears that it was this influx that boosted the number of referrals and contributed to this backlog.⁷⁸¹ What is also interesting apart from the *Judicial Statistics* returns is simply to consider the number of notebooks that the cases generated in the years 1944-54, the time of Eastham’s stewardship.

Table T 6.5 Number of referees’ notebooks

Year	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954
No. of notebooks	1	2	3	8	13	10	9	6	11	8	6

Source: Judges’ Notebooks J.114/1 to 34

If we take it that there were 77 notebooks in this decade, and roughly 7 books per year, then in any one year where there was an excess of 7 notebooks we might regard it as an exceptional year. We can therefore single out the years 1947–50 and 1952-53. This may indicate either that there were an increasing number of cases in those years, or otherwise, the cases were of increased complexity in terms of the judge having to hear more technical evidence.

We can also see by reference to table T.6.6 below that the number of cases covered by such entries increased enormously between 1947 and 1950. What we may also note is

⁷⁸⁰ n. 51 Lines:16AF and 16AH.

⁷⁸¹ Notebooks J. 114/5 and J. 114/6, T. Eastham K.C. (1947-49)

that the surviving notebooks cannot possibly represent the full quota of cases referred to in Table T 6.5 and many records must be missing as suggested earlier in Chapter 4.

Table T 6.6 Referees' caseload and value of cases

Year	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960
Referrals	248	309	468	458	501	458	422	450	438	317	280	276	257	241
Backlog	202	218	269	223	272	211	208	225	220	169	167	186	199	159
Average value*	286	553	280	309	189	308	315	-	-	461	297	534	-	416
Effective disposals	183	399	418	454	452	519	425	432	443	368	282	257	281	281

Source: *Civil Judicial Statistics Analysis*⁷⁸²

*this value has been calculated from the values of judgments given by the referees as recorded in the notebooks sampled as stated in the Appendix C.6

Between 1949 and 1955 there were four referees in post. This establishment disposed of more than 400 cases a year, and reduced the backlog from 269 cases in 1949, to 220 in 1954. Their disposal rate was maintained until 1955 and then declined, as did referrals, for a while. The number of referrals in this period doubled from 248 in 1947 to 501 in 1951, and then roughly halved by 1960.

6.3.3. Nature of referrals and probable cause of delay

Most of the cases after the war were dilapidations claims, War Damage Act claims, damage to property (both personal and real), marine claims for trawlers and dredgers, general builders claims for non payment of invoices, variations, extras, matrimonial property claims, nuisance, car repairs, partnership disputes, claims for damages for clothing, skins and hides, sale of builders materials and conversion of property as well as some negligence actions. Some negligence actions were permitted in this Court until 1954. There had been controversy on this point in the case of *Osenton v Johnston* where the House of Lords decided against the referees doing professional negligence work.⁷⁸³ Parliament conferred a right of appeal so the referees could undertake such work.

We found in chapter 4 a number of examples of micro caseload management techniques being applied in building cases, especially in cases where preliminary issues were raised. In chapter 5 we found that building cases were the more numerous (Table T. 5.25, 5.26, 5.33 and 5.34). After the war such building claims were mostly claims by builders for extra work and War Damage Act claims in the nature of assessments of

⁷⁸² n.51

⁷⁸³ [1942] A C 130. Such appeals were permitted on a question of fact relevant to a charge of fraud or breach of professional duty. See: Section 18(1) Supreme Court Act 1981 and under RSC Order 58 r. 4 (1) (b)

damages. There were also a number of instances of matters of account and enquiry and report as has been noted at paragraph 6.1.2 and 6.1.3. A number of complex account matters were dealt with and some of these undoubtedly contributed to delay and backlog e.g. *Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties.)*⁷⁸⁴ Our statistical analyses and the referees' notebooks indicate that the most probable cause of delay was the increasing complexity of cases and an increasing number of claims and referrals of a building nature. Such delay caused a build up of cases in the list causing an increasing backlog especially after 1963.

In summary the notebooks show that in 1947 cases for works carried out, breaches of specification, and claims for defects of various types were heard.⁷⁸⁵ In 1948, there is evidence of valuation of building work and damages for dilapidations cases. In 1949, further evidence of defective building works, non payment of invoices and claims in respect of builders materials. In 1950, there is evidence of claims regarding breaches of building regulations by builders and the beginnings of more complex cases involving what contractors termed "loss and/or expense," i.e.: damages for breaches of the employers obligations to the builder mainly in respect of additional works, extra labour and other charges. Most of these cases in this period were of a value under £500.

Taking the period 1951-56 we find a number of claims for valuation of builders' works in 1951, followed in 1952 by claims for defective work and bad design as well as more complex civil engineering cases. By 1955, we find claims for negligence against surveyors, followed in 1956 by actions for breaches of planning regulations, non-payment of invoices and claims for extra costs of builders' works. So from the early 1950s there are the beginnings of more difficult building claims, and indications that the claims were of increasing value involving more complex quantification of damages. For instance, one such case in 1952 refers to 121 items of work. We also see the emergence of expert witnesses being called more frequently with rare appearances of single joint experts or matters referred to a surveyor. We find the referees frequently dealing with matters by way of preliminary issue. There is some evidence of encouragement for settlement as well as orders for experts to agree "figures as figures."⁷⁸⁶ In one case, in 1959, the experts were required to meet together and agree figures. This became common practice in the 1980s. There is increasing technical

⁷⁸⁴ J.116/3 p.193 [Oct 2006 Series: SH101093]

⁷⁸⁵ In particular those of Sir Tom Eastham K.C.

⁷⁸⁶ Practice where the quantity surveyors on both sides agree that in the event of liability being decided the quantum figure will be that as they have agreed.

complexity on the building side with regard to the employment of quantity surveyors, the valuation of variations and the quantification of “loss and expense.” There is evidence of claims in respect of the date of practical completion, claims for liquidated damages and delay, extensions of time, certification, and valuation of variations and interpretation of contract clauses. As between 1957 and 1960 there is further evidence of claims for additional builders work, valuation of work, completion date, time defects and *quantum merit* claims. In short, we see a gradual increase in the complexity of building claims which increasingly required more time and expertise. Thus, to an extent the referees’ court gradually evolved into a construction court.

Having considered the backlog problem and its probable causes, and before synthesising the data and concluding we now consider the limitations imposed upon this research by the extent of the contemporaneous material that survives.

6.4 Research limitations

As explained earlier at paragraph 1.9. *Civil Judicial Statistic’s Table XII*⁷⁸⁷ for the years 1919-38 and 1947-70 may not contain all the cases of this court.⁷⁸⁸ Neither can we be sure that the notebooks reviewed in Chapters 3 and 4 and those summarised in the Appendix are complete for the reasons given in paragraph 6.3.2.⁷⁸⁹ We must also have regard to the lack of Minute Books and Judge’s Notebooks in the pre-war period. Thus, the analysis of the critical period 1923-33 can only be assessed in Chapter 5 using limited sources. Whilst this gives us an indication, the research is restricted by a lack of contemporaneous judges’ notes or minutes recording the time taken in early case management “experiments.” This is compensated to an extent by the direct evidence of Newbolt’s correspondence with, and reports to, the Lord Chancellor, as well as his publications. The two research periods are interrupted by the Second World War with no *Judicial Statistics* between 1939 and 1946.⁷⁹⁰ I was able to trace Eastham’s Notebook covering the period 1944-46.⁷⁹¹

⁷⁸⁷ Return for the Official Referees’ Court.

⁷⁸⁸ In an interview with the author The Head of the T.C.C stated that he had checked *Judicial Statistics* recently and found discrepancy with recent returns from the court.

⁷⁸⁹ See Appendix for: *Data Analysis of Minute Books Nos. 4 & 5; Cases Not Recorded in Minute Books [1959-62]; Data Collection: Minute Book/Judges’ Notebook Analysis at end of Second Period(Second Sub-Division)as an efficiency demonstration[1965-67];Cases Not Recorded in Minute Books [1965-67].*

⁷⁹⁰ See: Appendix. Letter to author from Mr Vollmer, House of Lords Library.

⁷⁹¹ J.114/1.

6.5 Referee workload

From the average calculations in Chapter 5 we can argue that there is a probability that the referees' efficiency was affected by the measures they adopted to resolve cases earlier without the need for trial. We may also suggest that trials were expedited by the various means used by Newbolt and others whether by hint to counsel, by adjournment or by the definition of preliminary questions and issues. We know that Newbolt considered he could reduce 80 per cent of the trial time by his use of a single joint expert, and we also know that his "discussions in chambers" were effective. This may have affected the figures in Table T.6.7 below which is compiled from the analysis at paragraph 6.2:

Table T.6.7 Summary of average annual caseload and disposals per referee

	1919-38	1947-70
Referrals	128	145
Trials	53	60
Resolved before trial	35	33
	1959-62	1965-67
Referrals	146	197
Trials	52	28
Resolved before trial	38	85

Source: Judicial Statistics 1919-38 and 1947-70

This table gives us an overview of the research periods. It is a general picture from which we can compare the workload of the court on an average *per capita* basis. What we find is that the differences are marginal before and after the war save that in the two sub-periods after the war there appears to be marked differences in the number of cases tried and those settled. We may conclude that there was a greater emphasis upon trials in 1959-62, and upon disposal before trial in 1965-67.

6.6. Conclusions

Our aim in this chapter has been to present a synthesis of Newbolt's "Scheme" and rudimentary micro-caseflow management with the objectives of the Judicature Commission. We have also considered the subordinate character of the court and its referral jurisdiction as well as further discussing the backlog problem and its effect on micro caseflow management.

At macro-case management level we may conclude:

6.6.1. That there was a linkage of objectives, insofar as the Commission established a subordinate judicial officer, who could act more informally to suit the exigencies

of the case, and the needs and convenience of the parties ,when the case demanded.

- 6.6.2. That the Commission achieved their objective of reducing pressure on the superior court judiciary by the referral process in much the same way as the old Chancery practice of referrals to a master reduced pressure on the Court of Chancery.
- 6.6.3. That expensive jury trials were avoided by referrals of such case to referees in the nineteenth century and of the non-jury list cases in the 1920s.
- 6.6.4. That by referral of these cases, the High Court list was relieved of cases that might otherwise have caused considerable delay to other litigants.
- 6.6.5. That there was an advantage to litigants in the referral of matters of account recognised by the Evershed Committee which formed a significant part of the referees' work. The referees submitted that the process was expensive but the Committee saw advantage to litigants in retaining it.⁷⁹² The research shows that there were occasional referrals of such cases.

At micro-caseflow management level we may conclude:

- 6.6.6. Chart 6.1 measures the numbers of cases brought in against trials and disposals. This shows how disposals trebled until the early 1960s. The Chart findings support the hypothesis in the earlier period up to 1932 when the disposal rate decreased. An overall trend appears to be that as disposals before trial increase so does the backlog, but where this happens there is an increase in referrals.
- 6.6.7 We find efficient disposal rates both in Newbolt's time and Richards's time. In both periods compared in Table T.6.1 there is a doubling of referrals. Table T.6.1 also confirms, for the years analysed, a tripling of disposals before trial in Newbolt's time and an almost quadrupling of disposals in Richards's time.⁷⁹³ We see a disposal rate of 40 per cent in Newbolt's time and 37 per cent in Richards's time. The difference is insignificant when we consider the numbers of cases the court dealt with in those comparative times. Since we know that both Richards and Newbolt were activists and encouraged settlement, we may conclude that such results are due to the use of micro caseflow management techniques as described in chapters 3 and 4. If that is right then the hypothesis is supported by these results, albeit limited.

⁷⁹² n.32 p.40 paragraph 109.

⁷⁹³ Paragraph 6.2 (c)

- 6.6.8 From the further analyses of backlog we find that the referees, on the whole, managed to keep the backlog at a certain limit with varying degrees of success as illustrated in Chart C.6.2 and Chart C 6.3. There was a time from 1963 when the backlog seemed to spiral, and it is clear the referees could not keep it at previous levels.
- 6.6.9. The jurisdiction after the war became more diverse and complex⁷⁹⁴ as also observed in chapters 2, 3, 4, and as noted in the appendix data collection.⁷⁹⁵
- 6.6.10. The backlog proportionately decreased after the war from a high of 80 per cent of referrals in 1947 to 65 per cent of referrals in 1960.⁷⁹⁶
- 6.6.11. *Judicial Statistics* are the best evidence we have, apart from contemporaneous materials, of the workflow of this court. We can hypothesise and draw reasonable conclusions on the balance of probability as to the usage of a form of micro caseload management in these times.⁷⁹⁷
- 6.6.12. The average analyses in Table T. 6.7 suggest marginal differences between the pre and post-war periods. This is previously confirmed by the formulaic analyses in chapter 5, but taking into account the rise in backlog and increasing referrals such differences also noted at Table T.5.11 are not surprising.
- 6.6.13. The dramatic rise in backlog between 1963 and 1970 has been attributed to the increasing number of referrals from 441 in 1963 to 901 in 1970, a 48 per cent rise.⁷⁹⁸ It has also been attributed at paragraph 6.3.3 to the increasing complexity of cases especially in the building field. This is despite the caseload management of Richards and the fact that between 1963 and 1970 Richards and his successors nearly doubled the rate of annual disposals from 183 in 1963 to 329 in 1970.⁷⁹⁹

⁷⁹⁴ Paragraph 6.2.4(c).

⁷⁹⁵ See Appendix for: *Data Analysis of Minute Books Nos. 4 & 5; Cases Not Recorded in Minute Books [1959-62]; Data Collection: Minute Book/Judges' Notebook Analysis as an efficiency demonstration [1965-67]; Cases Not Recorded in Minute Books [1965-67]*.

⁷⁹⁶ See: Paragraph 6.3.1.

⁷⁹⁷ See: Paragraphs 6.3.3 and 6.4.

⁷⁹⁸ n.51 Line 5 AT-BA

⁷⁹⁹ n.51 Line 14 AT-BA

CHAPTER 7

EXPEDITION AND ECONOMY IN CASEFLOW MANAGEMENT

This chapter synthesises the conclusions as to the evolution of the “Scheme” described in earlier chapters and addresses the research questions which we asked in chapter 1.

7.1 Research questions

The research questions posed in chapter 1 were:

- (g) why the office of referee was invented and what caused and facilitated case-flow management?
- (h) what was Newbolt’s “Scheme,” and what were the reasons for his application of this rudimentary form of case management?
- (i) what was the impact of such “Scheme” according to the literature review of the archival materials that survive and what conclusions can be drawn?
- (j) to what extent did Newbolt’s “Scheme” promote expedition and economy in the court’s work?
- (k) to what extent, if at all, did the referees promote settlement and save costs?
- (l) what was the impact of this “Scheme” as ascertained by qualitative and quantitative analysis of *Judicial Statistics* and the original court records?

Taking each of these in turn:

(a) why the office of referee was invented and what caused and facilitated caseflow management.

We can answer this question in the context of chapter 2. Our conclusion is that to an extent referees adopted the old Chancery practice of reference to a master or chief clerk, or to an arbitrator under the Common Law Procedure Act 1854. It was also a substitute for a lay jury. It was invented to overcome the deficiency in the Common Law Procedure Act 1854 of non-compulsory referral, and needless expense of referral back to the court to correct erroneous awards of commercial arbitrators. What caused and facilitated a rudimentary form of caseflow management were the outmoded trial system, the divergent remedies in different courts of separate jurisdiction, and the backlog of cases, some of which involved complex factual matters of a scientific or technical nature. What facilitated it was the subordinate nature of the referee’s office permitting Newbolt to adopt a more flexible and informal process in some areas.

(b) *what was Newbolt's "Scheme," and what were the reasons for his application of this rudimentary form of case management?*

We ascertained in Chapter 3 that Newbolt's "Scheme" could be identified from his account in *Expedition and Economy in Litigation*⁸⁰⁰ and from his reports to the Lord Chancellor. The elements were identified more specifically as:

- (a) Special procedures in chambers enabling informal referee resolution and early settlement;
- (b) Judicial intervention at various stages of the process to effect settlement;
- (c) The use and invention of the single joint expert/court expert;
- (d) The use of a proportionate approach to costs so that the costs of the case should have some reasonable relationship to the value of the item in dispute;
- (e) The invention of special forms of submission such as a Referees' Schedule;
- (f) The formulation of preliminary issues or questions for the court;
- (g) Flexibility as to the place of hearing at more economic locations and attendances on site.

The primary reason why Newbolt exercised such innovative powers, usually with the consent of both parties, was principally to achieve expedition and economy in litigation. That was his objective and that is what he confirmed to Lord Birkenhead, and what is described in his article in the *Law Quarterly Review*.⁸⁰¹ As is suggested in Chapter 6 there is symmetry between Newbolt and the Judicature Commissioners objectives. Apart from the identified seven elements of caseflow management Newbolt was concerned that the case be brought in as soon as possible. The earlier the case was considered for directions by the referee the better.⁸⁰² It was also his view that the trial judge should take his own summonses for directions as was the referees' practice. It was that unique practice that gave Newbolt his chance to exploit his scheme of efficiency and economy. It was at the first directions hearing in chambers where "mere discussions across a table which costs nothing in comparison with the costs per minute in court"⁸⁰³ were held. These would have been held shortly after the referral and used by him to understand the issues and promote either an effective process or encourage settlement. How far the latter went is not certain but the quantitative analyses in Chapter 5 indicate some marginal effect. Newbolt also suggested that a second summons be taken before

⁸⁰⁰ n.2 p. 427

⁸⁰¹ n.2 pp. 427-435.

⁸⁰² n.2 pp. 435-437.

⁸⁰³ n.2 p. 435.

trial, a practice followed by his successor Eastham. By these means the court exerted more control over the process.

Newbolt's use of experts was of particular advantage to litigants resulting in cost and time savings. Newbolt wrote that this saved litigants four-fifths of the time normally spent on such matters.⁸⁰⁴ In Chapter 5 we measured the effect of Newbolt's "Scheme" in particular at paragraphs 5.4 and 5.9.2.⁸⁰⁵

The apparent reason for the "Scheme" was the state of the referees' lists when Newbolt became a referee. Coinciding with Newbolt's appointment was the acquisition of the non-jury list which trebled references in the three years 1919-21. He refers to this in his July 1920 Report to Lord Birkenhead. He reported that this list "will occupy my Court for a year." Two cases in that list took eighteen months to reach trial. It is clear that what troubled him is probably what also troubled Lord Bowen in writing anonymously to *The Times* in 1892: "how much is it likely to cost and how soon at the latest is the thing likely to be over?"⁸⁰⁶ Newbolt's ingenuity was to link cost and time and to utilise the subordination of his office for the benefit of the parties. He did this by means of an alternative process: informal discussions in chambers. He considered settlement to be at the heart of the judicial process in a number of cases. This is what distinguishes him from other referees and judges of those times.

We consider (c) as to the "Scheme's" impact subsequently.

*(d) to what extent did Newbolt's "Scheme" promote expedition and economy in the court's work?*⁸⁰⁷

The extent to which Newbolt's "Scheme" promoted economy and expedition in litigation has already been noted in chapter 3 and its evolution traced and quantified to a degree in chapters 4, 5, and 6.

What emerges is the view that the referees in many cases succeeded in trying cases "within a few weeks after the order of reference."⁸⁰⁸ That would mean an efficient completion rate for those times and harmonisation with the objectives of Newbolt's "Scheme." Eastham made that comment in his memorandum to the Lord Chancellor on 13 July 1954. In that year 302 cases or 46 per cent of the 657 referrals were tried: there

⁸⁰⁴ n.2 p 427.

⁸⁰⁵ See also Table T.5.38.

⁸⁰⁶ *The Times*. August 10 1892. p.13

⁸⁰⁷ (c) is considered below at paragraph 7.4.

⁸⁰⁸ LCO 2/5976. [HPIM 0936]

was a backlog of 225 cases, with 130 others being disposed by settlement or otherwise. The percentage of disposals (otherwise than by trial) that year was down at 15 per cent below the post-war average percentage of 24 per cent.⁸⁰⁹

We concluded in chapter 5 (Table T. 5. 38) that there was a considerable average time saving in those cases where there was evidence of micro-caseflow management. Newbolt attested to the fact that his use of experts could cut trial times by up to 80 per cent. We found that in the two periods 1959-62 and 1965-67 the time saving on average varied between 3 hours 45 minutes and 12 hours 5 minutes.⁸¹⁰ If the average trial day lasted 3 hours 20 minutes this represents a considerable time/cost saving for the litigants.

Whilst the quantitative analysis supports the efficiency ratings in the earlier period and supports the hypothesis that caseflow management was a factor in achieving this result, the increasing backlog indicates the contrary taking into account the trend of a backlog rise from 163 cases in 1963 to 446 cases in 1970.

According to *Judicial Statistics* presented in Table T. 5.9, the average referrals in the pre-war period were 384 per year with an average backlog of 121 cases per year or 35 per cent of the annual average number of referrals. After the war there were 581 referrals on average per year with an average backlog of 229 cases, or 39 per cent of the average number of annual referrals. This is not surprising and may be accounted for in overall 55 per cent increase in referrals from 7,683 in the 1919-38 period to 13,932 referrals accruing in the post war period 1947-70.

One significant conclusion in chapter 5 is that 9 per cent of all Carter's referrals had some element of micro-caseflow management. Although building cases made up a proportion of the referees work such cases although factually complex did not take up as much time as other cases in the 1959-62 period, but in the 1965-67 period after more complex R.I.B.A forms had been introduced the average time spent on building cases increased on average 10 to 13 hours beyond the time spent on other types of case. If we take into account Tables T.5.40 and T.5.41 these give us some indication that such matters were more expeditiously resolved by caseflow management methods. In Table T. 5.40, 17 instances are documented, and in Table. T 5.41, 14 are documented.

⁸⁰⁹ n. 51.

⁸¹⁰ Paragraphs: 5.6.2 and 5.7.1..

Apart from these analyses the *Final Report of the Committee on Supreme Court Practice and Procedure*⁸¹¹ acknowledged the “more expeditious form of trial before an Official Referee.” Whilst the comment was made in the context of a possible right of appeal on matters of fact the acknowledgement of their reputation is sustained.

(e) *To what extent, if at all, did the referees promote settlement and save costs?*

The extent to which settlement was promoted is perhaps the most controversial issue in this study. Whilst Lord Birkenhead, did not consider this matter to be the function of the trial judge, Newbolt thought it was his duty to compromise the case so far as the parties allowed him to do so. He did not appear to have any reservation about that. It was easier for him, a subordinate judge, to effect settlement by business-like discussions in chambers than it was for a High Court judge. This could be facilitated by the referees who could adopt a more informal and flexible approach at directions hearings. High Court judges did not have that opportunity, but even if they had such opportunity such conduct would not have been acceptable for fear of undue judicial influence as Birkenhead warned.

Support however for Newbolt’s “Scheme” may be inferred from page 13 of the *First Report of the Commissioners*⁸¹² where the Commissioners were charged with establishing tribunals that were: “capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried.” The referees carried out the mandate of their tribunal by adjusting the procedural norms to suit the parties and the case, dealing with the matter in a more business like fashion. The referees were the substitute for expensive arbitral references which often entailed further references back to the High Court. They were also a substitute for juries that had difficulty with complex factual cases of a scientific and technical nature. Thus, referees avoided the useless expense of such ineffective processes. There is evidence in chapters 3 and 4 as to the adoption of experts’ opinion, and to referrals to experts for determination of certain technical questions. To an extent the referees adopted some practices of surveyors such as the Scott Schedule. In the arbitral context it was the relative informality of the interlocutory process that contributed to the referees’ success in micro caseflow management. More particularly it was the seven elements of micro caseflow management identified in chapter 3 that may have given referees the advantage over arbitrators because the referee could issue orders as a High Court judge

⁸¹¹ n.22.

⁸¹² n. 5.

particularly in relation to matters of discovery and production of documents.⁸¹³ Under the same rule the referee had power to enter judgment.

The adjustment of “the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried” encompassed not just the way the judge conducted the trial, but the interlocutory process that some referees undertook to achieve earlier settlement.

In Newbolt’s case this was at the core of his judicial philosophy which he expressed in *Expedition and Economy in Litigation*:⁸¹⁴

to use the available machinery of litigation to enable them to settle their disputes according to law without grievous waste and unnecessary delay and anxiety: and in particular to show them how this, if desired, may be accomplished.

It is debatable whether that philosophy was acceptable then or even now as the proper role of a judge in a court of law.⁸¹⁵ Newbolt had that debate with Birkenhead. The latter was clearly of the view:

1. that settlement was of obvious importance to the lay client;
2. there were “dangers” in the judge doing this;
3. clients sometimes desired to have a fight and were sometimes more content with defeat rather than an “inglorious peace.”

That view was probably the view of the senior judiciary of those days. That view does not take into account the financial disparity that often existed between parties to a building dispute which entailed disproportionate legal and expert expense. It does not take account of the financially weaker party being unable to pay either the damages or costs at the end of the case through the war of attrition that such litigation often became. We may consider the examples of cases such as: *Louis Obermeyer v Rodwell London & Provincial Properties Ltd*⁸¹⁶ where the trial lasted 19 days; and *Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties)*⁸¹⁷ where the trial lasted 45 days. Pecuniary inequality can lead to procedural disparity, and complexity can lead to protracted proceedings and lengthy trial. In those circumstances, and in consideration of other court users, especially where in Newbolt’s time the list trebled in three years, Newbolt considered intervention appropriate. Whilst a judge may

⁸¹³ RSC (1883) Ord. 36, r.50.

⁸¹⁴ n.2 p. 427

⁸¹⁵ J.M. Kelly, *Roman Litigation* (Oxford: Clarendon Press, 1966) p. 150 suggests it was the role of the imperial Praetors to settle cases.

⁸¹⁶ J.116/3 p.139 [Oct 2006 Series: SH101074] Summarised in the Appendix.

⁸¹⁷ J.116/3 p.193 [Oct 2006 Series: SH101093] Also summarised in the Appendix.

have to do justice to each case on the particular facts and merits, he has to dispense justice to all cases in his list. In this latter context Birkenhead's approach would appear passé.

It has been found in this study that some referees promoted settlement by means of Newbolt's "Scheme" as described in chapters 3, 4 and 6. Chapter 3 gives twenty examples of judicial intervention encouraging settlement. Newbolt's letter to *The Times* dated 4 September 1930⁸¹⁸ not only confirms his views about the utility of the single joint expert, but also suggests numerous ways in which he could otherwise encourage settlement. Such methodology is further described in his article: *Expedition and Economy in Litigation*⁸¹⁹ and in his reports to the Lord Chancellor. Chapters 3 and 4 contain a number of examples and references to judicial intervention. There are 29 instances identified in Table T. 5.35. Such illustrations must be taken as a mere indication of what may have been happening on a wider scale in Newbolt's time.

At paragraph 4.3.2 we noted a number of cases recorded in the notebooks which settled at the commencement of the case, the terms of which were embodied in the referee's order.

In other areas the referees differed in their interventions. For example, Walker Carter in *Cowley Concrete Limited v Alderton Construction Co Limited*⁸²⁰ issued a number of interlocutory orders. The case lasted for four years starting in 1962. Whilst there was some degree of case management it seems it was at the behest of the parties not the judge. On the other hand, Carter's notes for *W J Barrs Limited v Thomas Foulkes*⁸²¹ records a clear instance of effective judicial intervention regarding expert evidence. Carter was not satisfied and ordered a site visit as a result of which the counterclaim was dismissed. As is stated in chapter 4 his actions brought about a swift resolution of the case.⁸²² *Clifton Shipways Co Limited v Charles Lane*⁸²³ and Carter's notes dated 2 and 3 March 1960 indicate judicial participation in the final terms of settlement in chambers. Another example of effective caseload management is *Bogen v Honneyball & Rossal Estates Limited*.⁸²⁴ Whilst that case is not a good example of expedition-it took 6 years to resolve-a significant intervention was made by Norman Richards QC

⁸¹⁸ *The Times* 4th September 1930 p.11 Issue 45609 col. F.

⁸¹⁹ n.2 p 427

⁸²⁰ J.115/1 [HPIM 2685].

⁸²¹ J.116/3 p.49 [CIMG. 0102]

⁸²² J.116/3 p.49 [CIMG. 0103]

⁸²³ J.116/1 p.104[CIMG 0176]

⁸²⁴ J.115/49 [HPIM 2749] and see paragraph 4.3.2

when he directed further and better particulars, the exchange of experts reports, and set a trial date. This was the catalyst for settlement.

Chapter 4, like chapter 3, also supports the hypothesis regarding the effectiveness of rudimentary micro caseflow management. In chapters 5 and 6 we attempted to measure and describe the anti-hypothesis: those cases where there was no effective case management and those which were marginally affected by these processes depending on case type, and the party's adoption of the judge's suggestions. We also measured the backlog and its effect. We found that generally speaking the increased rate of settlement did not lower the backlog. An effective summation is provided in Table T.7.1 and the percentage rates of disposals and settlements.

Taking the research periods before and after the war we can measure the comparative disposal rates as:

Table T.7.1 Comparative disposal rates.

Year	Referrals	Disposals	Percentage disposed
1919-31	5,244	1,495	29%
1932-38	2,439	538	23%
1948-56	5,923	1,253	21%
1957-70	7,624	2,707	36%

Sources: Civil Judicial Statistics 1919-38 and 1947-70 and Table T.5.1.

From this analysis we see that from approximately a fifth to a third of cases were being disposed before trial. The mean average is just over 27 per cent which roughly equates with our conclusions at paragraphs 5.9.3 and 5.10 as to 25 per cent. If the hypothesis is right then these figures indicate that as many as a quarter of the cases may have been caseflow managed. Such conclusions appear to confirm a link between the more efficient disposal of business and micro-caseflow management. More so perhaps when we consider that the average rate of disposals to referrals before trial before the war was 27 per cent and after the war 24 per cent,⁸²⁵ the mean average being 25.5 per cent which equates to the proportion of cases caseflow managed.

At paragraph 5.3.4 the general conclusion we came to from the quantitative study in chapter 5 was that the key to effective micro caseflow management is early settlement or resolution. The average rate of the disposal of cases before trial, and the numbers of cases disposed of, was discussed in paragraph 5.4.1 (b) and in Table T.5.7 from which we concluded an average disposal of 27 per cent of cases before the war, and 24 per

⁸²⁵ See paragraph 5.4.1(b)

cent after the war. Whilst this is not significant, the average in Newbolt's time which we calculated as an average disposal of 29 per cent of cases before trial⁸²⁶ may be regarded as very slightly above the average and just slightly the more effective.

Tables 15 and 16 in the Appendix to chapter 5 contain more examples of cases settled in court and the time occupied by the court.

*Martin French v Kingswood Hill Ltd*⁸²⁷ is a case in point where there is clear indication of judicial encouragement for settlement. Another example of prompting settlement is found in Chapter 6 and the reference to *Alexander Angell Limited v F C Pilbeam (Male)*⁸²⁸ where Percy Lamb's clerk issued the standard settlement enquiry to the parties. A further example was noted in the *Clifton Shipways Co Limited v Charles Lane*.⁸²⁹

As to overall comparative efficiency of Newbolt and Richard's times Charts C 5.1 and 2 confirm that referrals in the Newbolt era more than doubled between 1919 and 1923, and disposals before trial more than trebled in the same period. This corresponds to an almost identical doubling increase in referrals between 1962 and 1970 with a similar trebling of disposals.

More importantly the analyses of the *Judicial Statistics* in Charts C.5.2 - C.5.5 indicate support for the proposition that the referees were involved with judicial settlement. The substantial increase in disposal rates is demonstrated by Chart C. 5.2, from 20 per cent in 1921, to 41 per cent in 1931. This is significant. It is arguable that this extraordinary doubling of such rates is due to a more activist role.⁸³⁰ On the other hand, this is followed by a decline in disposal rates from 41 per cent in 1931, to 13 per cent in 1937 amounting to a 27 per cent decline which in those years indicates a more passive role. It may also be indicative of a higher focus on reducing the backlog of trials and a lack of manpower as there were only two referees in post in the latter period.

So far as the latter research questions posed in chapter 1 are concerned:

- (f) what was the impact of this "Scheme" as ascertained by qualitative and quantitative analysis of *Judicial Statistics* and the original court records?
- (c) what was the impact of such "Scheme" according to a literature review of the archival materials that survive and what conclusions can be drawn?

⁸²⁶ n. 51 Line 39 for years 1920-36 only

⁸²⁷ J116/1 [Oct 2006 Series; HPIM 1964] and J114/34 SH 101355

⁸²⁸ J.115/28 [CIMG 0117]

⁸²⁹ J116/1 p.104. [CIMG 0176.]

⁸³⁰ n. 51 Line 39C to 39N.

These have been answered in detail in Chapters 3-6 but are further considered here in this chapter in a synthesis of the study and the conclusions and recommendations that are suggested.

7.2 Discussion of a hypothesis of efficiency and economy

The hypothesis that the invention and evolution of a rudimentary caseflow management and consensual interlocutory process made referees more effective has been subjected to qualitative and quantitative examination. Our final discussion therefore centres on the implications of Newbolt's "Scheme" and on the supposition that this is more suitably addressed by Newbolt's idea of "informal discussions in chambers." This appears to be the major discovery of this study and unknown generally before now. The other extraordinary discovery is the instances of judicial intervention whether to facilitate settlement or to expedite proceedings. Judges did not overtly intervene to settle or expedite matters, but they often gave "indications" as to the merits of submissions which could certainly dissuade litigants from pursuing the case. Apart from Birkenhead's warnings to Newbolt Professor Fiss of Yale has argued that settlement is a negation of the judicial process.⁸³¹ Professor Cranston⁸³² puts Fiss's position clearly:

In the judicial administration perspective, he would argue, the opportunity to articulate legal values gives way to an over-emphasis on efficiency and technique, which demonstrates the value of law.

In the case of the referees "efficiency and technique" was a necessity. The underlying argument in this study is that referees like Newbolt had no real option other than to develop more efficient ways of dealing with long and complex cases. Contrary to Professor Fiss's philosophy Newbolt's way was not a means of undermining what Fiss calls the "value of the law." Newbolt used the law to provide an early answer and result that most probably would not have been very different from his judgment at the end of a trial. It is equally arguable that if Newbolt did not expedite some cases he and his colleagues could not have completed the job required. In this case it was very much a matter of practicality and doing justice to the merits of each case. Procedurally some cases could be dealt with by preliminary issues, some by expert decision, some by a site visit, and some by "informal discussions in chambers," and in many other cases, only by a full trial. To that extent Fiss's traditionalist view does not accord with the evidence of the referees' practice without which justice could not be done to the parties. If the

⁸³¹ O. Fiss, 'Against Settlement' (1984) 93 Yale L.J. 1073.

⁸³² R. Cranston, *How Law Works* (Oxford: Oxford University Press, 2006) 164.

referees had followed the traditional view that judges could not intervene or encourage settlement the delays and backlog would have been unacceptably greater.

To do justice to all the parties is the objective of caseflow management and at micro-level it means having regard to the rights of others to be heard within a reasonable time. The referees also had a contractual obligation to the Lord Chancellor to complete their lists and to some extent to the Treasury, to ensure that court resources were not wasted. They were also directly accountable to the Lord Chief Justice, their Head of Division. In that context they had an obligation to those whose cases they were to hear. Efficiency in this context was a necessity for justice to be done.

An essential element of micro-caseflow management is the allotment of sufficient time for the case. This must be considered from both a qualitative and quantitative standpoint. In the numerous cases discussed in chapters 3 and 4 there is a wide divergence in the subject matter. In chapter 5 we noted a considerable variance between the times allocated for certain cases. Some cases required more time than others for reasons of complexity, for example, *Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties)*⁸³³ which occupied the referee for 45 days. Others such as *Bickley v Dawson*⁸³⁴ required only 10 minutes. It is obvious that more complex and important cases require more judicial time and case management requires that the appropriate allocation be made. This entails allocating a fair and reasonable time to the case according to its judicial requirements having regard to its nature, complexity, importance, value of the claim, and resources of the parties. All this was encompassed in Newbolt's approach. His interventionist style did not apparently compromise the referee's neutrality or the principle of judicial independence; because where he intervened he appeared to be successful in resolving the matter. It cannot be right that every party has an automatic right to trial. Parties have a legal right to issue proceedings. If the case is not otherwise settled, the parties have a right, subject to the rules, to pursue the case to trial. However, in the context of restricted resources, such as were available to the courts in the 1860s and 1920s, the judiciary had to consider how justice could be apportioned economically and fairly to those who chose to litigate. In those circumstances the referees were compelled to manage cases more effectively: it was a matter of necessity.

⁸³³ See: Appendix Table 10 p.52 J116/3 p.193 [Oct 2006 Series: SH101093]

⁸³⁴ See: Appendix Table 10 p.52 J116/3 p.191 [Oct 2006 Series: SH101092]

7.3 Support for hypothesis of efficiency and economy

The interlocutory innovations invented by the referees for the more efficient conduct of business were recognised by the Evershed Committee on Supreme Court Practice and Procedure.⁸³⁵ This Committee which was appointed on 22 April 1947 produced four reports.⁸³⁶ Its primary purpose was to consider what forms of practice and procedure should be introduced “for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business.”

One of the recommendations of the First Report⁸³⁷ was to make it possible to transfer cases between referees. It has already been noted that this caused some concern to the Lord Chancellor’s Permanent Secretary, Sir George Coldstream in 1954.⁸³⁸ Historically this was a link with arbitration which was finally severed by operation of the rota.⁸³⁹ More importantly, Evershed’s Final Report⁸⁴⁰ adds credence to the hypothesis as to the efficiency of Newbolt’s “Scheme”.

In that report⁸⁴¹ Evershed recommended that “increased use should be made of the power under Order 37A RSC to appoint a Court Expert.” This was Newbolt’s innovation in the 1920s and an integral part of micro-caseflow management.

Second, Evershed recommended that where a plaintiff gave appropriate notice after the entry of an appearance by the defendant the plaintiff could apply to the master for a dispensation of pleadings.⁸⁴² In *Expedition and Economy in Litigation*⁸⁴³ it will be recalled from chapter 3 that Newbolt referred to a case of dilapidations where he dispensed with pleadings.

Third, Evershed said it was important that any further summons for directions should if practicable be heard by the same master.⁸⁴⁴ This followed the referee practice of referees taking their own summons for directions, and interestingly Newbolt’s earlier suggestion that a second summons before trial was beneficial.⁸⁴⁵ As Newbolt also wrote:

⁸³⁵ Save that Eastham’s and others suggestions about change of name did not find any support.

⁸³⁶ Cmnd. 7764; Cmnd. 8176; Cmnd.8617; and Cmnd.8878

⁸³⁷ *Interim Report of the Committee on Supreme Court Practice and Procedure*. Cmnd.7764, para. 108

⁸³⁸ Coldstream was a member of the Committee which produced the First Report and this recommendation which he later reviewed and revised in the form of Order 36 Rule 47(c) RSC to prevent transfers of cases between referees without the parties’ consent.

⁸³⁹ This was implemented by RSC Order 36A on 1st October 1957 giving effect to Section 15 Administration of Justice Act 1956.

⁸⁴⁰ n.22.

⁸⁴¹ n.22. p. 107.

⁸⁴² n.22. para. (3) p.319.

⁸⁴³ n.2 p.427.

⁸⁴⁴ n.20. para.(56) p.324

⁸⁴⁵ *The Times*. 4th September 1930. p.11. Issue 45609. col. F

..there is no greater check on wasteful expenditure than the arrangement by which the Trial Judge takes his own summonses.⁸⁴⁶

Fourth, Evershed heralded a “new approach” to litigation spearheaded by the *robust* summons for directions which would “limit the issues to be tried and the expenses of proof.” Again this coincides with the Newbolt philosophy of saving expense in the context of his article in *Law Quarterly Review*:⁸⁴⁷

*the mere discussions across a table which costs nothing in comparison with the costs per minute in Court*⁸⁴⁸, discloses what issue it is exactly that the parties wish to try, and eliminates the very source of the litigants grievances.

Fifth, Evershed aimed to make the Summons for Directions “a more effective instrument for reducing costs.”⁸⁴⁹ Again in that article Newbolt had underlined the importance of the cost saving utility of such summonses and hearings in chambers as opposed to the “costs per minute in court.”

Sixth, at paragraph (73) of the Report, Evershed recommended that it was desirable in every case that pleadings should be available to the judge before he came to court.⁸⁵⁰

This is certainly a practice that was adopted by the referees as is evident from the case of *Alloy & Fireboard Co Ltd v F. Superstein*.⁸⁵¹

7.4 The advantage of a subordinate judicial official

Having established further support for the hypothesis as to the more effective referee processes it remains, before drawing final conclusions, to consider the advantage, if any, of the subordinate judicial role. In this case it is submitted that the same strict judicial role that Fiss articulates might not apply to a subordinate judge especially where, as in this case, the judge has an important interlocutory function. The essence of this argument is Newbolt’s view that “the mere discussions across a table....costs nothing in comparison with the costs per minute in Court.” This study sustains the argument for the use of expedient and economic measures by referees in the 20th century, and to some extent confirms the success of such measures especially where the case settles before trial as a result of interlocutory intervention. It is arguable that in such cases a judicial officer has a duty in the best interests of justice to do so. Such a subordinate official has a greater flexibility when acting in a more informal chambers setting with the powers of a High Court judge. In acting with the consent of the parties he is in a

⁸⁴⁶ n.2 pp. 435-437.

⁸⁴⁷ n.2 pp.435-437.

⁸⁴⁸ Author’s italics.

⁸⁴⁹ n.22. para.(244) p.81

⁸⁵⁰ n.22. p. 326

⁸⁵¹ See: Chapter 4: Directions to Solicitors para. 4.3.1. J115/6 [HPIM 2716]

stronger position to facilitate settlement. In many cases the parties are not in an equal bargaining position and such intervention is a useful neutral instrument to assuage fears of the more influential party. In the case of the referee he is in a stronger position to resist any such domination, more so than an arbitrator because he exercises all the powers of a High Court judge and sits daily in court. Thus, Newbolt may have been able to hold the balance in such chamber's discussions whereas other non-judicial neutrals might not. By procedural innovation he was able to control the excesses of an adversarial process where settlement might otherwise have had a lower priority.⁸⁵²

7.5 The procedural judge

Thus, in the procedural context it may be said that the referee or procedural judge might enjoy a unique advantage over higher ranking judges. One of the central findings of this study is that judicial officers, exercising the "powers" of an English High Court judge, engaged in settlement discussions as long ago as the 1920s. This, so far as is known, is unprecedented.⁸⁵³ This remarkable fact suggests that the role of a subordinate judge may be considered more flexibly in the context of judicial hierarchical structures and his or her place in the legal system. Although referees were abolished by the Courts Act 1970 and they became circuit judges, and whilst there are now two grades of TCC judge, HCJ and CCJ, there is advantage to be considered in the maintenance of the subordinate grade, not to denigrate the office, but to facilitate the work of the court in the public interest where a more informal and flexible approach by a lesser judge might produce earlier resolution using some of the ideas of Newbolt. This subordinate judicial role has the advantage of combining the two key rudiments of dispute resolution in one forum: that of settlement and procedural management, in other words that radical notion that a judge can undertake a settlement role as well as a procedural one.

7.6 Synthesis from study

7.6.1. This synthesis considers the overall conclusions for and against the central hypothesis as to the invention of an expeditious and economic form of rudimentary micro-caseflow management in the 1920s, and its manifestations in an interventionist, and latterly a non-interventionist, judicial settlement process.

⁸⁵² Lord Woolf's Interim Report. Chapter 3 stated that "questions of expense, delay, compromise and fairness may have only a low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable."

⁸⁵³ The author is not aware of any such.

7.6.2. In the first chapter we considered the referee in the context of the discovery of a form of micro caseflow management in the 1920s. We also discussed the scope and methodology of the research, defining research questions and constructing a hypothesis that caseflow management and interlocutory process made the referees more effective. It also discussed the general history of the referee and his position in the judicial hierarchy. A preliminary analysis was conducted here to assess the general effectiveness of the referee. What we found in Table T.4.7 is consistent with subsequent formulaic findings summarised in Table T. 5.15.⁸⁵⁴ The mean average of the formulaic percentages presented in Table T. 5.15 amounts to 49 per cent before the war and 42 per cent after it. In paragraph 5.4.1(b) and from the Spreadsheet⁸⁵⁵ we ascertained that the overall average percentage of disposals to referrals was 27 per cent before the war, as opposed to 24 per cent after it. We also found that the percentage of trials to referrals was 41 per cent before the war and 32 per cent after it.

7.6.3 In the second chapter we concluded that the Supreme Court of Judicature had three essential macro-caseflow management forms in civil cases: trial by a single judge; trial by jury and trial by a referee. All these modes of trial were to be “capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried.” In terms of that objective it is submitted that such objective was achieved by the referees, and it is that aim that facilitated their practice. This found expression in informal directions meetings in chambers; the more effective use of expert witnesses and experts, whether as investigators or determiners of fact or opinion, and the invention of procedural directions and special pleadings to shorten court hearings and crystallise issues. One of the important practices to emerge out of the Judicature Commissioners’ objective was the referees’ practice of an early summons for directions, and the fixing of the date for trial within weeks of the reference. In the second chapter we considered the relationship between certain referees and Lord Chancellors and other senior officials. Under Section 83 of the Judicature Act 1873, the Lord Chancellor was responsible for their appointment, qualifications and their tenure in office with the concurrence of the Heads of Divisions subject to Treasury sanction. To that extent the Treasury played a very important part in the development of the court. Permanent Secretaries played a key role in the relationship and were kept well informed of

⁸⁵⁴ See paragraph 5.4.4.6

⁸⁵⁵ n. 51 Line 39

developments. There were no complaints about the quality of work, but the court was under-resourced in terms of manpower and accommodation intermittently. Status and salary were perceived as a problem in not attracting the right recruits. All these somewhat negative factors would have increased pressure to expedite the list.

7.6.4. This scenario provided the backdrop against which caseflow management evolved in the referees' court. The reasons are set out in Newbolt's contemporaneous reports and articles as well as in Eastham's reports and memoranda and are further demonstrated from the various extracts from the judges' notebooks after the war. Seven elements of micro-caseflow management are identified in chapters 3. Whilst chapter 3 does not identify particular case management directions such as fixing the date for trial, Newbolt hints at its effectiveness and that of a second interlocutory summons before trial. The foundation of this study rests upon those seven rudiments: early procedural evaluation by the referee in chambers; the efficient use of experts; directions resulting in proportionate costs and proportionate costs orders; special pleadings tailor made for the case; and the more convenient sitting of the court. The hypothesis contends that the application of one or more of these practices facilitated caseflow management in certain cases.

7.6.5. Chapter 4 continues the qualitative analysis and literary review of the judges Minute Books and Notebooks assessing the evolution of Newbolt's "Scheme" against a background of increasing litigation. When Eastham was appointed in 1937 there were 372 referrals that year. When he retired in 1954 (the year Walker Carter took office) the court had 657 referrals. By 1970 it had 901 referrals.⁸⁵⁶ It was against this background that Eastham triumphed in his caseflow management by confirming in a memorandum to the Lord Chancellor⁸⁵⁷ that despite a threefold increase in workload in the previous decade referee cases were often tried within a few weeks of the order of reference. In contrast to Newbolt it would appear that Eastham achieved success by ordering a visit to the building site and seeing the progress of work for himself. In several instances this resulted in settlement being agreed afterwards in court. He also appears to have granted adjournments giving the parties' time to reconsider their position before embarking on the trial. This reactive approach contrasts with Newbolt's active approach to caseflow management. It must be considered that just as some caseflow management mechanisms resulted in quicker resolution they were not suitable in all cases. In the majority of cases

⁸⁵⁶ n.51 Line 5AK-BA

⁸⁵⁷ LCO 4/417. [HPIM 0938].

considered in chapters 3, 4, and 5 hypothetically some measure of caseload management was used in almost a quarter of all cases between 1919 and 1970.⁸⁵⁸ Although there is some evidence of relative success with these procedural tools in chapter 5 we also concluded:

That Newbolt reduced the backlog by up to 51 per cent in the period 1919-31 (see paragraph 5.4.2)

That in 1937 the referees were 88 per cent efficient in terms of trials to referrals and 84 per cent efficient in 1948 in that respect (see paragraph 5.4.4.5)

That trial times could be halved (see paragraph 5.7.4) or in Newbolt's cases reduced by as much as 80 per cent. (Table T.5.34)

That in Newbolt's time the backlog was halved, and in Richard's time it trebled: see paragraph 5.4.4.1(b).

7.6.6. Experts were a particular tool of referee case managers like Newbolt. In the twentieth century expert evidence was admitted by direction of the court or by agreement between the parties. Newbolt went further with groundbreaking use of experts⁸⁵⁹ inventing a role for the court expert on the way. He found that the expert could be instrumental in settlement in terms of estimating quantum, or deciding the issue referred for opinion, or decision. Newbolt was also aware that experts could also be a wasteful expense if they were not managed. Where experts were used by him to determine facts or resolve issues it would appear that Newbolt briefed the expert with the consent of the parties. The expert answered his questions thus saving time and costs. Other processes used by the referees included special pleadings and schedules to reduce trial times and narrow issues.

7.6.7. Whilst there is evidence of chambers discussions resulting in settlement in Newbolt's time there is little contemporaneous evidence subsequently though *Clifton Shipways Co Limited v Charles Lane*,⁸⁶⁰ *W.J. Barrs v Thomas Foulkes*,⁸⁶¹ and *Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and Nathan Bernard and Ruth Bernard*⁸⁶² are all examples of similar chambers proceedings.

7.6.8. Statistical evidence has been analysed and assessed in Chapter 5 in relation to the effectiveness of Newbolt's "Scheme" and its effectiveness has been assessed both there

⁸⁵⁸ Chapter 5. Concluding remarks para. 5.9.3 and Table T.5.39.

⁸⁵⁹ As epitomised by the letter from Counsel, Mr S. A Merlin. LCO 4/152. [HPIM 0586-0587]

⁸⁶⁰ J116/1 p.104. [CIMG 0176.]

⁸⁶¹ J116/3 p.49 [CIMG. 0102.]

⁸⁶² J.116/1 [CIMG 195]

and above. What this demonstrates is an early remarkable attempt by the referees to save time and expense through extra-judicial measures almost like an arbitrator acting with the consent of the parties and in the interests of justice in the wider sense. The saving was in resolving the case before trial so that the enormity of those costs was saved. The underlying mechanism here is the settlement role of the judge. Without Newbolt's initiative it is doubtful that anything like this would have occurred in that way in the otherwise reputedly strict adversarial regime of the 1920s.

7.7. For hypothesis

In conclusion we can demonstrate an effective and efficient court supporting the hypothesis to the extent that:

7.7.1 At paragraph 5.4.3. and in Table T. 5.11 we noted that in 1919-38 the percentage of trials and disposals to referrals was 68 per cent and in 1947-70 it was 61 per cent. Both results were achieved during a time when we concluded that a form of caseflow management was used in 25 per cent of cases (paragraph 5.9.3 and Table T. 5.39)

7.7.2 At paragraph 5.4.1 (b) we concluded for the pre-war period that 27 per cent of referrals were disposed of before trial and 24 per cent after the war.⁸⁶³ Thus, a mean average of 25 per cent of cases was disposed of before trial, at a time when we hypothesise that a form of caseflow management was used in 25 per cent of such cases.

7.7.3 Perhaps the clearest demonstration of the "Scheme's" effectiveness is demonstrated in Chart C. 5.2 and the doubling in the rate of disposals to referrals from 20 per cent in 1921 to 41 per cent in 1931.⁸⁶⁴

7.7.4 From Tables T. 5.5 –T.5.7 and from paragraph 5.4.1 (a) we concluded that the court was 42 per cent effective in terms of trials /referrals before the war, and 31 per cent after.

7.7.5 The average analyses in Table T. 6.7 suggested that the post-war period was slightly more efficient in terms of trials. When we compared this with Table T.5.11 contrasting two eight year periods, one before and one after the war, the comparison demonstrated that referrals were slightly less efficient after the war in disposals and trials and that there was a higher backlog. The margin of difference again is slight at seven per cent (68 per cent: 61 per cent in terms of disposals and trials and 32 per cent: 39 per cent in terms of backlog).

⁸⁶³ n.51 Line 39

⁸⁶⁴ n. 51 Line 39 D to 39 N

7.7.6 We note from the spreadsheet⁸⁶⁵ a sharp decline in the number of trials from 144 in 1962 to 91 in 1970. This figure remains below the 100 mark until 1967. This coincides with a steep rise in settlement/disposal rates from 90 in 1962 to 329 in 1970.

7.7.7 We concluded from the application of the various formulae demonstrated in Charts C.5.2-C.5.5:

(a) Formulae A and B demonstrated that the average percentage of efficiency before the war was higher than after the war. Table T.5.15.

(b) The disposal/settlement rate was marginally better before than after the war.

(c) That before the war backlog of cases was lower.

(d) Newbolt's "Scheme" had a marked effect on disposals between 1919 and 1932.

(d) The Eastham court appeared the more efficient in trials.

7.7.8 Table 5.38 represents the critical average time analysis between managed and non-engaged cases. In respect of the cases where it has been possible to identify caseflow management elements, time spent has been radically reduced. Newbolt wrote that issues could be so narrowed:

to something which occupies the Court for perhaps one fifth of what used to be considered the normal time.⁸⁶⁶

This meant an 80 per cent time saving.

After the war further examination of the two research periods 1959-62 and 1965-67 show that time reductions of more than 50 per cent and practically 80 per cent were possible.⁸⁶⁷

7.7.9 Caseflow management properly applied could cut trial times in half or by two-thirds of the time.⁸⁶⁸

7.7.10 If the central hypothesis is correct then according to the average percentile applied at paragraph 5.9.3 and Table T.5.39 then as many as 5,404 or 25 per cent of all referrals may have been caseflow managed. Alternatively the suggestion of the analysis at Table T.5.37 and paragraph 5.9.2 suggests a lower average application of 22 per cent. The latter is purely based on the Minute Book and Notebook analysis. Both analyses argue for the existence of caseflow management and its degree of efficiency.

⁸⁶⁵ n. 51 Line 14 AS to BA

⁸⁶⁶ n. 2 p 427

⁸⁶⁷ Table T.5.38 comparing columns 5 to 8.

⁸⁶⁸ See: paragraph 5.7.4.

7.7.11 Finally what we also discern from paragraph 4.3.5 is that the “Scheme” gradually evolved into a more modern concept of caseload management. Generally we have also found that Newbolt seems to have been selective in using the “Scheme” in particular cases in an early form of what has become known as “differential case management” in the United States.⁸⁶⁹

7.8. Against hypothesis

7.8.1. Judicial Statistics confirm that in the period 1957-70, the number of disposals ranged from 66 to 329, higher than in other periods examined; the backlog of cases increased from 167 in 1957 to 446 in 1970. Referrals increased from 449 in 1957 to 901 in 1970. Whilst referrals more than doubled, the backlog almost tripled. Failure to deal with backlog is not a sign of effective caseload management.⁸⁷⁰

7.6.2. More cases were tried than were summarily disposed of between 1919 and 1938: there were 3,202 trials, and 2,048 cases otherwise disposed of. Between 1947 and 1970 there were 4,360 trials compared to 3,335 cases that were otherwise settled or disposed of.

7.6.3. That despite the existence of caseload management the backlog of cases increased after the war. However, there were only 3 referees in post from 1957 to 1970 when the average annual intake was 586 referrals as compared to the earlier period from 1919 to 1938 when the average annual intake was 437 cases per year.⁸⁷¹ It appears that diminution in manpower in the periods 1932-38, and 1956-70, was a critical factor. This was despite evidence of rudimentary caseload management activity. The backlog rose from 82 cases in 1919 to 109 cases in 1938 and from 202 cases in 1947 to 446 by 1970.⁸⁷²

7.6.4 In Tables T 5.40 and T 5.41 we found 34 examples of caseload management out of a total of 346 case entries examined in Carter’s Minute Books. This suggests that roughly 10 per cent of his cases may have had some caseload management.

7.6.5. In Table T.5.8 in terms of backlog we found that each referee had an average backlog of 40 cases before the war and 76 after the war. In both periods we see an increase in backlog and a lack of manpower. Despite this in the first period backlog was

⁸⁶⁹ Bakke, H and Solomon, M ‘Case Differentiation: an approach to individualised case management’

74 *Judicature* 17 1989-1990.

⁸⁷⁰ See Charts C 6.2. and C.6.3.

⁸⁷¹ n. 51

⁸⁷² See: Table 5.10.

kept below 130 cases per year with only two judges in post. In the second period the increasing backlog occurs at a time of when the rate of disposal is above 32 per cent.⁸⁷³

⁸⁷³ n. 51 Lines: 5 (referrals) and 16 (backlog) and Line 39 (disposal percentages.)

CHAPTER 8

IN PURSUIT OF JUSTICE

In any justice system the role of procedure is far greater than generally accepted.⁸⁷⁴

8.1 Key findings from research

From this study we conclude that there have been gaps in our knowledge of procedural practice undiscovered for many decades. Judge Fay teasingly described the referees' practice as:⁸⁷⁵

.....the judges operate what might be termed a limited dossier system: in advance of interlocutory proceedings they expect to be provided with the relevant papers and to familiarise themselves with the issues; in consequence they not infrequently themselves make suggestions with a view to rendering the trial more manageable or shorter or less expensive.

But he did not enlighten us as to the "suggestions" being a significant part of the "Scheme" nor did he describe the "Scheme." Essentially we discovered that there was more to the referees' function here that was conducive to earlier settlement. The referee was a facilitator and by entrepreneurial means described as the "Scheme" created the atmosphere for settlement.

Thus, we deduced that:

- The referee saved High Court judge time and jury trials.
- The referee acted as a facilitator in encouraging settlement earlier in some cases.
- Such interlocutory management had a positive effect in terms of efficiency and economy in technically complex factual cases so that in quantitative terms up to a quarter of all cases may have utilised the "Scheme" [7.3.3].
- This produced a possible time saving of 50 per cent to 80 per cent of time at trial [7.5.8].
- The "Scheme" produced a marked effect on caseflow as considered in Chapters 3 to 6 especially where a more "activist" approach was adopted.

Having discovered that Newbolt was ahead of his time we conclude by considering how this study contributes to our knowledge of dispute resolution in the context of the competing cultures of a traditional adversarial system and modern informal alternatives. More importantly we should consider how this discovery may affect our thinking about what a court is, or should be, and what a judge is, or should be.

⁸⁷⁴ Lord Woolf, *The Pursuit of Justice* p.16. (Oxford: 2008)

⁸⁷⁵ n.20 p. 7 paragraph 1-06.

8.2 Of Woolf and Newbolt: contrasting case management concepts

What Newbolt created was essentially a new role for the referee at interlocutory stage utilising the traditional role of a master as a judge. In essence the “Scheme” induced a more facilitative atmosphere: a display of “soft power” in informal chambers discussions as opposed to “hard power” in a formal court room setting.⁸⁷⁶ The atmosphere Newbolt created in his “discussions” was the catalyst for settlement. His active caseflow management coincides with the objective described in CPR 1.4(2) (f)⁸⁷⁷ of

(f) helping the parties to settle the whole or part of the case

It also coincides with Lord Woolf’s policy, described in his *Interim Report*:⁸⁷⁸

...to develop measures which will encourage reasonable and early settlement of proceedings.

Newbolt was *directly* involved in chambers discussions, as he put it: “the mere discussion across a table.”⁸⁷⁹ Newbolt thought there was no more effective way of dealing with cases than for the judge to deal with his own summonses.⁸⁸⁰ This corresponds with the Woolfian concept of the “procedural judge.”⁸⁸¹

The “Scheme” also mirrors the Woolfian concept of promoting settlement whereby Lord Woolf stated:⁸⁸²

11. Case management will facilitate and encourage earlier settlement through earlier identification and determination of issues and tighter timetables.

Newbolt’s concept of expedition and economy are also reflected in the CPR with references to proportionality and cases being conducted “expeditiously and fairly.”⁸⁸³

Newbolt was also far before his time in moving away from an antagonistic approach to litigation which in his *Interim Report* Lord Woolf⁸⁸⁴ likened to “a battlefield where no

⁸⁷⁶ The differences between “soft” and “hard” power were described by Professor Joseph S. Nye of Harvard University’s Kennedy School of Government in a public lecture at the L.S.E. on 8th May 2008. They are further described in his book: *The Powers to Lead* (O.U.P. May 2008)

⁸⁷⁷ *Civil Procedure Rules 1998*.

⁸⁷⁸ *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*. Chapter 24, paragraph 1 (London. Stationery Office, 1995)

⁸⁷⁹ n.2 p.437.

⁸⁸⁰ n.2 p.437.

⁸⁸¹ n.878 paragraph 11

⁸⁸² n.878 paragraph 12.

⁸⁸³ CPR 1.1 (2) (c) and (d).

⁸⁸⁴ n.878

rules apply.” This was also Newbolt’s perception. Whilst a tiny minority of cases⁸⁸⁵ will be fought to the bitter end, as Lord Birkenhead observed in his response to Newbolt in his letter dated 21 February 1922, Newbolt defused such adversarialism by his “Scheme.” This was achieved by the informal atmosphere of chambers hearings, for example, by counsel remaining seated. This was more business-like and more conducive to settlement.

In his *Final Report*⁸⁸⁶ Lord Woolf described his approach to case management:

Chapter 1 Introduction

....

4.

...Case management includes identifying the issues in the case: summarily disposing of some issues and deciding in which order other issues are to be resolved: fixing timetables for the parties to take particular steps in the case: and limiting disclosure and expert evidence.

He described case management as:

6....

The aim of case management conferences in multi-track cases is that fewer cases should need to come to a final trial, by encouraging the parties to settle their dispute or to resolve it outside the court system altogether, and that for those cases which do require resolution by the court the issues should be identified at an early stage so that as many of them as possible can be agreed or decided before the trial. The pre-trial review should then take further steps to ensure that the trial will be shorter and less expensive. Case management hearings will replace, rather than add to the present interlocutory hearings. They should be seen as using time in order to save more time.

This description certainly finds empathy with Newbolt’s “Scheme” as do the conclusions at paragraph 16 of Lord Woolf’s *Interim Report*:

- (b) Encouraging and assisting the parties to settle cases or at least to agree on particular issues;
- (c) Encouraging the use of ADR;
- (d) Identifying at an early stage the key issues which need full trial;
- (e) Summarily disposing of weak cases and hopeless issues;
- (f) Achieving transparency and control of costs....

Whilst neither of Lord Woolf’s reports, nor the rules go as far as Newbolt’s “Scheme” in relation to “discussions in chambers” the rules, as we have noted, provide for:

helping the parties to settle the whole or part of the case.⁸⁸⁷

This has not been interpreted by the editors of *Civil Procedure*⁸⁸⁸ as enabling the judge to discuss settlement with the parties in chambers, but rather that the judge may refer the

⁸⁸⁵ In the case of the Mayor’s and City of London Court 140 cases out of 5,777 were tried in 2006, approximately 2% of the claims issued. Roberts, S. Report for the Mayor’s and City of London Court Mediation Steering Committee. (London: London School of Economics, 2007)

⁸⁸⁶ n.14.

⁸⁸⁷ CPR 1.4(2)(f)

matter to ADR. It also encourages the parties to exchange settlement offers or dispose of the case summarily. The beauty of the Newbolt approach was that, in some cases, the referee himself was actively engaged in the settlement. This approach is in line with that taken by the District Judges in their caseload management practices.⁸⁸⁹

8.3 The “Scheme” and ADR concepts.

Having compared the concept of Newbolt’s “Scheme” with the Woolfian concept of caseload management we now take a closer look at ADR critiques in the context of Newbolt’s “Scheme.” According to Auerbach the mediation movement had its origins in Cleveland, Ohio in 1913, seven years before Newbolt’s experiments in caseload management.⁸⁹⁰ That movement originated outside the legal system and gradually evolved in other urban centres in the United States. It is perhaps better described by the ‘father’ of ADR, Professor Frank Sander⁸⁹¹ as “an alternative primary process” being:

....particularly appropriate in situations involving disputing individuals who are engaged in a long-term relationship. The process ought to consist of a meditational phase, and then, if necessary an adjudicative one.

Newbolt’s “Scheme” followed that pattern in respect of his early chambers discussions. If the parties agreed, Newbolt facilitated settlement; if not, he gave directions up to trial. In his article Frank Sander describes a dispute resolution centre housing different types of dispute resolver encompassing features of Newbolt’s “Scheme.” Such a development has not taken place in England but private dispute organisations have been established to promote ADR which include CEDR, Resolex, and the Chartered Institute of Arbitrators. To an extent the courts have utilised ADR with pilot schemes in mediation being run in the Central London County Court, The Mayor’s and City of London Court and in the Technology and Construction Court. In 1996 judges in the Central London County Court established a mediation scheme. The scheme was monitored and became the subject of a report by Professor Genn.⁸⁹² Whilst practitioners were impressed by the commercial acumen of the mediators they had reservations as to their legal knowledge and procedural direction. Perhaps this echoes the concerns of the Judicature Commissioners regarding commercial arbitrators in the 1860s which we noted earlier in Chapter 2. Genn also had some concern about “arm twisting” because in some cases

⁸⁸⁸ *Civil Procedure* Vol. 1 paragraph 1.4.9 CPR 1998 (London: Sweet & Maxwell 2004)

⁸⁸⁹ As observed whilst practising in several County Courts.

⁸⁹⁰ J.S. Auerbach, ‘Justice Without Law? Resolving Disputes Without Lawyers’ pp 96-97 (O.U.P. 1983)

⁸⁹¹ n. 336

⁸⁹² L.C.D. No.5/98. *The Central London County Court Pilot Scheme*. Evaluation Report. Professor Hazel Genn.

mediators used undue pressure on the parties. Judges do not need to use such pressure and have no commercial incentive as do commercial mediators. Newbolt did not appear to bully or cajole, but gave an honest assessment of the likely outcome of the case in the course of his discussions. Ten years later, in 2006, The Mayor's and City of London Court initiated a similar Scheme which was the subject of Professor Roberts' report above cited. He noted the commitment of the District Judges at the court and the lead they took in designing and operating an effective scheme.⁸⁹³

Roberts and Palmer⁸⁹⁴ detect a shifting culture change away from the traditional trial and judgement concept to "the primary task of sponsoring and managing negotiations." This maybe what Newbolt envisaged by his approach to "discussions in chambers." They also sense we are still on a voyage of discovery in understanding these evolving processes and their relationship *inter se*. Their thinking is supported by the interest of the TCC judges today who follow, possibly unwittingly, in the tradition of Newbolt.

The key to reconciling these philosophies is to be found in Newbolt's letter to Lord Birkenhead⁸⁹⁵ dated 13 February 1922 where he extolled his confidence in "friendly business discussions over the table." This had two fundamental qualities: direct discussion as to settlement, and second, the weight of independent judicial authority. Newbolt's discussions might be interpreted by what Fiss called "the anticipation of the outcome of trial."

Again, according to Roberts and Palmer⁸⁹⁶ the courts have now "embraced ADR in their novel enthusiasm for sponsoring settlement." Newbolt perceived this a long time ago motivated by the economics of litigation, yet according to most commentators, such as Galanter, it was the United States judiciary who took the lead in this field in terms of judges acting as mediators,⁸⁹⁷ which may include a settlement role as, for example, in the Delaware Court of Chancery.⁸⁹⁸ This role extends to the Middlesex (Cambridge) Superior Court near Boston, Massachusetts,⁸⁹⁹ a novel multi-door courthouse facility with a variety of dispute resolution processes available.

⁸⁹³ n.885 para. 40.1.

⁸⁹⁴ S. Roberts and M. Palmer, *Disputes Processes*. p.362 (Cambridge: 2005)

⁸⁹⁵ n.287. [HPIM 0593]

⁸⁹⁶ n.894. p.77

⁸⁹⁷ M. Galanter, 'The Emergence of the Judge as a Mediator in Civil Cases' (1986) 69. *Judicature* 5, pp 257-262.

⁸⁹⁸ L.E. Strine, Jr, "'Mediation-Only' Filings in the Delaware Court of Chancery: Can New Value be Added by one of America's Business Courts?" (2003-2004) 53 *Duke Law Journal* 585 at p.593

⁸⁹⁹ See; B.E. Steadman, 'Multi-option Justice at Middlesex Multi-Door Courthouse' cited in R.Smith (ed) *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s* (1996) Legal Action Group, London .

In his article Galanter⁹⁰⁰ states:

Most American judges participate to some extent in the settlement of some of the cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work.

He goes on to describe the conversion of American judges to this approach describing early experiments of Mr. Justice Edgar J. Lauer of the Municipal Court of New York in the mid-1920s,⁹⁰¹ just after Newbolt commenced his "Scheme." When we examine Lauer's approach which was described by Lauer in an article in 1928 it is similar to Newbolt's:⁹⁰²

...to call counsel to the bench before me and interrogate them respecting the nature of the case and the prospect of adjusting differences. I have secured many settlements without the exercise of any pressure on the parties to reach settlement

These complimentary developments on both sides of the Atlantic may have been entirely coincidental for there is no evidence that Lauer had heard of Newbolt's "Scheme."

Gallanter gives further evidence from Ryan and Wickham⁹⁰³ who quote a presiding judge in Madison who wrote:

the primary purpose I seek to obtain out of such [pre-trial] conferences is to effect settlement without trial...I offer suggestions, intimate to the attorneys and clients the possibility and extent of liability, suggest the range of what I believe to be a fair settlement and then also attempt to persuade the parties and their attorneys to accept a settlement within that range. Of course I can only do this when I am fully conversant of the facts.

He also quotes a senior federal judge who said:⁹⁰⁴

The absolute result of a trial is not as high a quality of justice as the freely negotiated, give a little, take a little settlement.

Galanter also quotes further American judicial authority and wrote:⁹⁰⁵

In the words of one thoughtful federal district judge, settlement 'produces results which are probably as close to the ideal of justice as we are capable of producing.'

If settlements are good, it is also good that the judge actually participates in bringing them about. He should do this not only by his management of the court but also by acting as mediator.

In this sense it seems that the Newbolt approach is recognised as part of the judicial process in the United States, save that Newbolt did not perceive his role as that of a mediator. When he used an accountant expert he noted that this was not the role of an:

⁹⁰⁰ n.897 p.257.

⁹⁰¹ n.897 p.258.

⁹⁰² Lauer, 'Conciliation-A Cure for the Law's Delay,' 156 ANNALS 55 (1928)

⁹⁰³ 'Pre-trial Practice in Wisconsin Courts,' 1954 Wisconsin Law Review 24 (1954)

⁹⁰⁴ n.897 p.261.

⁹⁰⁵ n.897 p.261

...arbitrator or conciliator or concession, but an intelligent use of a court of justice by business men.

What Newbolt did was to facilitate settlement. This did not displace the adjudication landscape with a negotiation process as appears to have been the case in the United States.⁹⁰⁶ The extraordinary discovery in this study is that Newbolt's "Scheme" encompasses both the philosophy of the 'access to justice' and ADR movements. We may consider the first as encompassing what Roberts and Palmer⁹⁰⁷ describe as:

...the contemporary expression of primordial concerns about the costs, delays and general inaccessibility of adjudication, and called for quicker, cheaper, more readily available judgement with procedural informality as its hallmark.

Newbolt's "Scheme" satisfied these concerns because of Newbolt's anxiety about costs, delay and the productive results from his informal discussions. Another remarkable facet of Newbolt's "Scheme" was its creativity. In that context, his "Scheme" anticipated Derek Bok's prediction that:⁹⁰⁸

Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperative and design mechanisms that allow it to flourish, they will not be at the centre of the most creative social experiments of our time.

8.4 Reconciling critiques

Having contrasted these competing philosophies we consider the critiques of ADR that require consideration in the context of this study. Nader and Abel suggest that ADR is a way of institutionalising settlement.⁹⁰⁹ But ADR is essentially an alternative the parties can agree; they are free to use this alternative to the court but they are not prevented from using the court. Abel⁹¹⁰ says that the State neutralises:

conflict by responding to grievances in ways that inhibit that transformation into a series of challenges to the domination of State and capital.

Such inhibitions have not been noted in this study and it would appear from cases such as *Bickerton*⁹¹¹ that our highest court is not averse from challenging institutions in the

⁹⁰⁶ M. Galanter, 'A Settlement Judge is Not a 'Trial Judge': Judicial Mediation in the United States (1985) 12 *Journal of Law and Society* pp. 12-15.

⁹⁰⁷ n.894 p.45.

⁹⁰⁸ D. Bok, 'A Flawed System of Law and Practice Training' (1983) 33 *Journal of Legal Education* 570, pp 582-583

⁹⁰⁹ n.894 p.76 and see: Nader, L., *The Life of the Law: Anthropological Projects* p.162 (California: 2002)

⁹¹⁰ R.L. Abel: 'The Contradictions of Informal Justice' in R.L. Abel, *The Politics of Informal Justice; The American Experience* (New York Academic Press: 1982) pp.280-281.

⁹¹¹ Paragraph 6.1.3 above.

public interest. Abel also says that ADR is anti-normative.⁹¹² Fiss goes further saying that:⁹¹³

In truth, however settlement is also a function of the resources available to each party to finance the litigation, and these resources are frequently distributed unequally.

That being the case Newbolt's "Scheme" would appear to offer the better way because the judge will be able to direct a process more tailored to the financial resources of the parties.

Abel's deeper concern that the parties will be bullied by the State into accepting an unjust compromise may have some justification. Abel argues that ADR is an extension of State authority.⁹¹⁴ But here that argument is met by the incorporation of the "Scheme" within the court process and whilst the referee was a state official he acted in the wider public interest as a public servant. The "Scheme" avoids the critique of Nader⁹¹⁵ who argued that the "deficiencies of litigation have been falsely portrayed" and her critique noted by Roberts and Palmer⁹¹⁶ that:

It began to look very much as if ADR were a pacification scheme, an attempt on the part of powerful interests in law and in economics to stem litigation by the masses, disguised by the rhetoric of an imaginary litigation explosion.

But we have already noted that both the Judicature Commissioners and Newbolt years later were concerned with something that was by no means an "imaginary litigation explosion"; it was real. The same was true of the necessity for Lord Woolf's enquiry, particularly in relation to the referees, where cases in the 1980s were quadruple booked. We can also meet Abel's concern that "informal institutions deprive grievants of substantive rights" and antinormative processes that "urge the parties to compromise."⁹¹⁷ But, compromise is often an ingredient of judgment. The court may accept only particular submissions and evidence. Cases are seldom black or white: there are innumerable shades of grey on narrow issues of law and fact. Parties may argue they have rights, when no right truly exists or they may be unable to discharge the burden of proof required. Often the remedy (usually monetary compensation) may not satisfy the parties, but then there is a limit to what the state can do. In the triadic structure of the

⁹¹² n. 910 pp. 297-298.

⁹¹³ O. Fiss, 'Against Settlement.' (1984) 93 *Yale Law Journal* 1073 at p.1076.

⁹¹⁴ n. 910 pp.270-271, and 275.

⁹¹⁵ Nader, L., *The Life of the Law: Anthropological Projects* p.144 (California: 2002)

⁹¹⁶ n.894. p.76 and see: Nader, L., *The Life of the Law: Anthropological Projects* p.144. (California: 2002)

⁹¹⁷ n. 910 pp. 297-298.

court and the two sides sometimes it is the judge who must invent the formula which will resolve the dispute.

8.5 A new model judge

Having considered some of the critiques of ADR we can finally turn to the critical question underlying this study. This was identified in Roberts' essay: 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship'⁹¹⁸ in which he asked that fundamental question whether we should see ADR "as part of the process of adjudication, radically transferring it, even making us re-examine our basic understandings of what a 'court' is?" We may surmise that Newbolt would have responded to Roberts' question enthusiastically and have redefined the judge's role to encompass that of a facilitator. This empathises with Dean Roscoe Pound's notion about:⁹¹⁹

....a judge who represents both parties and the law, and a procedure which will permit him to do so effectively.

What appears to be inextricably linked in this study is the symmetry of judicial management and settlement. Newbolt's "discussions in chambers" would not have been possible in any other court because no judge at that time had conduct of the interlocutory process. What happened was that Newbolt was able to narrow issues to the point that in some cases they settled: caseload management led to settlement.

In suggesting this we must take careful note of Birkenhead's warning to Newbolt, and Roberts' concern that "clarity is lost once the courts begin to involve themselves in the sponsorship of settlement."⁹²⁰ This challenge has to be met if the courts are to continue to enjoy public respect and if certainty of the law is to prevail for the key questions of our times are first, that discerned by Roberts and Palmer as to what a court is, but also in this context what a court should be or in more practical terms how the judge's role can be modernised to keep pace with social change. Those are the critical issues of civil justice that emerge from this study. What may be required are displays of "soft power" or the facilitative process suggested by the "Scheme" which to use Martin Shapiro's words is not: "an antithesis to judging but rather a component part in judging."⁹²¹

⁹¹⁸ (1993)56. MLR 452

⁹¹⁹ R. Pound, 'The Administration of Justice in the Modern City' (1912-1913) 26 Harvard Law Review 302 at p.319.

⁹²⁰ A.A.S. Zuckerman and Cranston, Ross. *Reform of Civil Procedure* 'Essays on 'Access to Justice.' (Oxford: 1995) p. 462

⁹²¹ M. Shapiro, *Courts: A Comparative and Political Analysis* (The University of Chicago Press. 1981)

Newbolt's "discussions in chambers" reminds us of Shapiro's discussion of the prototype of courts⁹²² where the parties and the judge:

Speak on until arriving at some verbal formulation of the law synthesised from their various versions

It is not suggested that the judge engineers settlement but rather that the parties realise that the outcome at trial is unlikely to be different. Often that is the advice the parties have received from counsel and are persuaded, but in some cases it may take a judge. This is not usurping the lawyer's role, nor is it undermining judicial independence in cases where the outcome is clear and inevitable. Provided the judge has sufficient information before him and the parties probable outcomes converge with the reduction of uncertainty, judicial intervention would appear to be justified.⁹²³

Whether the judiciary can change their culture is another matter and is a challenge identified by Professor Zuckerman of Oxford who recently wrote:⁹²⁴

... unless all levels of the judiciary can be persuaded to embrace the overriding objective that incorporates the requirements of proportionality and expedition, as well as of the need to do justice on the merits, the entire CPR system may become a colossal wreck.

Zuckerman's point is in harmony with Newbolt's objectives outlined in his seminal article.⁹²⁵

It is sobering to recall Professor Zander's reservations concerning the civil justice reforms in his thought provoking paper: *Why Woolf's Reforms Should be Rejected*.⁹²⁶

His essential concern was that Lord Woolf's 'Interim Report' was not properly structured in terms of an "historical perspective, a rounded in-depth analysis of the problems, a weighing of options and a conclusion."⁹²⁷ Lord Woolf said that he and his team had carried out "what is suggested to have been the most extensive and thorough examination which has ever taken place into the civil justice system."⁹²⁸ One of Professor Zander's major criticisms was on the subject which forms the basis of this thesis; the efficiency of case management.⁹²⁹ He considered that it would only operate

⁹²² n.921 above p. 13.

⁹²³ See for example; P.H. Schuck, 'The Role of Judges in Settling Complex cases: The Agent Orange Example' (1986) 53 University of Chicago Law Review 337.

⁹²⁴ A.A.S. Zuckerman 'A Colossal Wreck-the BCCI-Three Rivers Litigation' (2006) 25 (Jul) Civil Justice Quarterly 287.

⁹²⁵ n. 2

⁹²⁶ n. 920 pp. 80-95.

⁹²⁷ n. 920 p. 79.

⁹²⁸ n. 874 p.331

⁹²⁹ n 920. p. 90

in “a small proportion of cases.”⁹³⁰ This study suggests that the “Scheme” operated in up to a third of all referee cases. But importantly Professor Zander also recognised the need to get a grip on cases that were “dragging.”⁹³¹ Zander’s concern was perhaps met by Lord Woolf’s understanding of what case management would achieve.⁹³²

It is the court providing a forum in which lawyers and the judge can work out the most satisfactory way a case can be dealt with and the judge then supervising the progress to trial in accordance with that programme. What the judge will prevent is parties not fulfilling their responsibilities, acting unfairly to a weaker party or acting unreasonably.

A relatively recent Rand study by Dr James S. Kakalik: *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act*⁹³³ concluded:

Four case management procedures showed consistent statistically significant effects on time to disposition: (1) early judicial management; (2) setting the trial schedule early; (3) reducing time to discovery cut off; and (4) having litigants at or available on the telephone for settlement conferences.

Kakalik’s conclusions support the findings of this study in terms of early judicial management and settlement discussions. We may also find other features of process in the United States in further harmony with the “Scheme” for example; the Settlement Master described by Silberman.⁹³⁴ The Settlement Master, like a referee, was empowered to enquire and report, as well as facilitate settlement. Unlike referees Settlement Masters are not judicial officers but practitioners. Silberman suggests that the role of the Settlement Master in the *Agent Orange* case was successful because he acted with judicial powers and knew the views of the judge.

8.6 Ariadne’s thread

Having answered the research questions this study goes some way to unravelling Ariadne’s thread in terms of the essential question posed by Professor Roberts. What we discovered was that even a rudimentary system of caseflow management was effective particularly where the judge was more interventionist.

From an historical perspective this central finding supports, the former Head of the TCC, Mr Justice Jackson, who stated that case management “is the principal service which the TCC provides to court users,” and that one of the twin objectives of the TCC

⁹³⁰ M. Zander, *Are There Any Clothes for the Emperor to Wear* (1995) 145 New Law Journal 154

⁹³¹ M. Zander, *Woolf on Zander* (1997) 147 New Law Journal 768

⁹³² n.874 p.339

⁹³³ 49 Alabama Law Review 17 (1997-98)

⁹³⁴ L. Silberman, ‘Judicial Adjuncts revisited: the Proliferation of Ad Hoc Procedure’ (1988-89) 137 University of Pennsylvania Law Review pp.2131-2178.

judges was: "facilitating settlement where this is possible."⁹³⁵ In that report Jackson, J. referred to research currently being undertaken at King's College London to identify the types of cases in which mediation most commonly leads to settlement and the stage in the action at which mediation is most effective.⁹³⁶ This is a good starting point. What this study suggests however is a more radical role for a new model judge where the judge is more active in settlement discussions without being a mediator or conciliator. Newbolt acted at his discretion with party consent to achieve what today we would call the overriding objective.

The model of Newbolt's "Scheme" has wider implications for the judiciary in certain cases. Being informal and *ad hoc* may have a benefit so that the parties do not feel that such "discussions in chambers" are mandatory or that they are pressurised unduly. Any untoward "arm twisting" would be an abuse of the judicial office.⁹³⁷ The Genn study reveals that in 18 per cent of cases the parties enter into mediation because the judge advised them to do so.⁹³⁸ Genn also noted "a significant tendency for more judicial encouragement from 25 per cent of the cases compared to 11 per cent in 1998."⁹³⁹ This is a healthy sign in harmony with Newbolt's philosophy. The fundamental question posed by Roberts as to what a court is may be answered to some extent by the Newbolt "Scheme." This not only involves a change of culture but a radical reappraisal of the judge's role. There is some evidence from the Vice Chancellor of the Delaware Court of Chancery that Newbolt's interpretation of his function remains valid.⁹⁴⁰ In his essay Vice Chancellor Strine writes:

....the active involvement of a judge in the process of helping parties to business disputes resolve their conflicts consensually (particularly ones that arose from incomplete contracting in the first instance) seems likely to be of economic value and to have social utility. By providing parties with the opportunity to shape their own solutions to litigable controversies with the input of an experienced business judge, this mechanism should result in more efficient outcomes at less risk and expense than awaiting an up-or-down judgment on the merits.

⁹³⁵ Mr Justice Jackson. 'Annual Report for the Technology and Construction Court 2005/6.' (2007) 23 *Construction Law Journal*. 13.

⁹³⁶ n. 935 paragraph (6) p.21, and see also Hudson-Tyremen, Aaron. 'Encouraged, Pushed or Forced-The Order of the day?' 2008 *Construction Law Journal* 79

⁹³⁷ Concern has clearly been expressed in Professor Genn's recent study: *Twisting Arms: Court Referral and Court Linked Mediation under Judicial Pressure*. Ministry of Justice. May 2007.

⁹³⁸ H. Genn, *Twisting Arms: Court Referral and Court Linked Mediation under Judicial Pressure*. Ministry of Justice. May 2007. p.155.

⁹³⁹ n. 938 p. 156, and H.Genn (1998) *Central London County Court Pilot Mediation Scheme: Evaluation report*, L.C.D. Research Series 5/98.

⁹⁴⁰ L.E. Strine, Jr, "'Mediation-Only' Filings in the Delaware Court of Chancery: Can New value be Added by one of America's Business Courts?" (2003-2004) 53 *Duke Law Journal* 585 at p.593

We may be moving in this direction. But there is something else of importance here, a factor Newbolt recognised as did the Judicature Commissioners: user requirements. Lord Woolf also recognised society's demands of the judiciary:⁹⁴¹

....just as the common law has evolved to meet the changing requirements of society, so should the role of the common law judge. It is of critical importance to society that the judicial role evolves in this way.

In this study we have seen how the referees' office evolved and importantly why and how Newbolt was pro-active in procuring settlement at an early stage. This again fits the archetype suggested by Lord Woolf:⁹⁴²

Where litigation in the courts is unavoidable, then the judges need to be proactive in promoting settlement, the control of costs and the expeditious resolution of the dispute.

This also harmonises with the concepts espoused by Roberts and Palmer.⁹⁴³ In this sense as Galanter⁹⁴⁴ says: "we have moved from dyadic to mediated bargaining" but also what Professor Resnick identified⁹⁴⁵ as a shift from the traditional judicial model to a managerial style where the court assumes more control of the process overall. In that respect Newbolt went further because he moved settlement from the periphery to the centre stage of the process. More importantly he used management as a tool of settlement and was quick to appreciate that caseflow management could shift the focus of proceedings from trial to settlement. This is the central lesson we derive from this study so we may therefore suggest what a court could be recognising this shift:

- The judge's role in relation to encouraging settlement must be considered in the context of his caseflow management powers. Whilst recognising a culture shift towards more judicial control of the proceedings there must be more awareness of the need to facilitate settlement through party participation in chambers-like discussions. The lesson of the "Scheme" suggests that a triadic configuration and the interaction of the judge and the parties present an effective means. Settlement must be the underlying objective.
- The quantitative analysis in chapter 5 supports the activist theory of caseflow management as being the more efficient. Our findings in both chapters 3 and 4 demonstrate the utility of that theory in terms of early judicial evaluation in chambers discussions, encouragement of settlement, the relevant use of court

⁹⁴¹ n. 874 p.193

⁹⁴² n.874 p.195

⁹⁴³ n.894. p.362

⁹⁴⁴ n.897 p.262

⁹⁴⁵ Resnick, 'Managerial Judges' 96 Harvard. Law Review. 374-448 (1982)

and other experts and proportionate costs orders. To that extent there is strong argument in favour of judges taking an activist approach. The “cultural change” of recent years must continue to encourage such activist role in order to avoid the danger foreseen by Professor Zuckerman.⁹⁴⁶

- A fundamental tenet of the “Scheme” was that the judge was the case manager as well as trial judge. This gave Newbolt, Eastham, Carter and Richards especial advantage in expediting cases.
- That “arm twisting” and “churning” of cases by private mediators may be avoided by judges following the example of Newbolt’s “Scheme.” The American examples appear to support this view.
- This study demonstrates the success of the Judicature Commissioners invention and it maybe that a subordinate judiciary still has a very important role in an earlier more informal process with greater opportunity at its disposal to resolve cases earlier.
- A mix of judges at different levels may be advantageous giving subordinate judges greater opportunity to encourage settlement at interlocutory stage.
- Costs for particular activities should be capped in proportion to their importance in the case with special attention to the lower value cases.⁹⁴⁷
- In less complex cases suitably experienced and specialist solicitors should be encouraged to deal with cases without counsel with the primary objective of settlement.
- Considering Eastham’s success in dealing with the trial of a case in “a matter of weeks” after referral, and because referees have traditionally also acted in arbitration matters with permission, there is no impediment in principle to their successors being appointed as adjudicators, or the court being made an appointing body in its own right under the Housing (Grants and Construction) Act 1996. Enabling legislation would be required to amend the statute. This power would meet the procedural concerns of an important sector of the economy, the construction industry.

⁹⁴⁶ The omens in that respect are disheartening as Professor Zuckerman has noted in his article: ‘A Colossal Wreck-the BCCI-Three Rivers Litigation.’ See: n. 924 above..

⁹⁴⁷ Professor Genn concluded in her appraisal of costs that: “The lower the claim value, the higher the percentage of the claim value that cost represents.” Appendix III paragraph 19 p.355. see: n.14 above.

This study has described the referee's transition from a nineteenth century judicial officer to a modern facilitator of settlement. In many ways this study supports what Eisenberg said:⁹⁴⁸

...the principal area of modern legalised dispute settlement intimately intermixes elements of mediation and dichotomous solution, consent and judicial imposition.

What is suggested here is merely an extension of those principles outlined by the Judicature Commissioners 141 years ago. Recent reforms may not yet have changed the culture of the legal profession, or from what Professor Zuckerman suggests, of the judiciary. But it appears that the TCC judiciary do follow unwittingly the innovative tradition of Newbolt. If Lord Woolf's objectives and the aspirations of Newbolt are to be achieved in line with what Lord Devlin suggested⁹⁴⁹ further encouragement along such lines may be required. The price of justice should not be a bar to the quality of justice: the problem that has defied reformers for almost two centuries is how to achieve both ideals.⁹⁵⁰ Like unravelling Ariadne's thread this may involve a new model judge with an enhanced sensitivity towards settlement. The recent Robert's Report on The Mayor's and City of London Court suggests that the District judges may have already unravelled that thread.⁹⁵¹

8.7 Sailing on the *Arbella*

Juxtaposing this study with current thinking it may be that we can harmonise the competing philosophies of alternative reconciliation and adversarial resolution. In that debate the role of the referee and Newbolt's "Scheme" may provide a key.

In a sense this study reconciles the competing philosophies of ADR and CPR philosophy in terms of the "Scheme" and raises questions as to the judge's modern role. The judge can no longer sit passively in complex technical cases and let them run on *ad nauseam*. At the same time *proportionality* demands that cases are resolved sooner rather than later. There is overriding merit in many complex cases in the court seizing the initiative and intervening to encourage settlement. That is really the essence of what may be deduced from this thesis reconciling the opposing philosophies. We have yet to

⁹⁴⁸ M. Eisenberg, 'Private Ordering through Negotiation: Dispute Settlement and Rulemaking,' (1976) 89 *Harvard Law Review* 637.

⁹⁴⁹ In 1970 he questioned whether "it is right to cling to a system that offers perfection for the few and nothing at all for the many?"

⁹⁵⁰ See H. Colleen, 'More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform.' (2008) 27(1) *Civil Justice Quarterly* 98.

⁹⁵¹ n.885.

decide where ADR stands in relation to civil justice. We have yet to decide the judges' twenty first century role, and we have yet to decide upon a multi-door court facility. Whilst we may advocate the enhancement of judicial powers and intervention for the best of reasons we must ensure that justice is done without inhibiting the parties' rights to a fair trial.

Newbolt's "Scheme" was a step towards a new frontier of civil justice. We must therefore continue our journey toward that new frontier, just like all those who sailed on the *Arbella* all those years ago, to find that "city upon a hill." We too must sail on as pilgrims in search of that model of justice.

Michael P Reynolds

LSE July 2008

The London School Of Economics And Political Science

***CASEFLOW MANAGEMENT: A RUDIMENTARY REFEREE PROCESS,
1919-70***

BIBLIOGRAPHY AND APPENDICES

Michael Paul Reynolds

Bibliography

Parliamentary Papers and Reports

- First Report of the Judicature Commissioners* [Session 10th December 1868-11 August 1869] (No. 41340) Vol. XXV 25 March 1869
- Interim Report of the Committee on Supreme Court Practice and Procedure.* Cmnd.7764 (1949)
- Second Interim Report of the Committee on Supreme Court Practice.* Cmd. 8176 (1951)
- Final Report of the Committee on Supreme Court Practice and Procedure.* Cmnd. 8878 (1953)
- Report of the Royal Commission on Assizes and Quarter Sessions 1969.* Cmnd. 4153
- Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales.* (London. Stationery Office, 1995)
- Final Report to the Lord Chancellor on the Civil Justice System in England and Wales.* (London. Stationery Office, July 1996)
- Genn, H. (1998) *Central London County Court Pilot Mediation Scheme: Evaluation Report*, L.C.D. Research Series 5/98
- Genn, H. (May 2007) *Twisting Arms: Court Referral and Court Linked Mediation under Judicial Pressure.* Ministry of Justice, London.
- Roberts, S. *Report for the Mayor's and City of London Court Mediation Steering Committee.* (London: London School of Economics, 2007)
- Rand Organisation, *Statistical Overview of Civil Litigation in the Federal Courts* (Dugworth and Pace. 1990)

Civil Judicial Statistics

- For 1919: 1921 [Cmnd. 1424,1362] xli.411
[*Statistics for 1920 and 1921 were published as non-Parliamentary Papers*]
- for 1921:1923 Cmnd. No. 2001 Vol. xxiv;
- for 1922, 1923 [Cmnd. 2001] Vol. xxvi. 1;
- for 1923, 1924-25 Cmnd. No. 2277 Vol. xxviii;
- for 1924: 1924-25 Cmnd. No. 2494 Vol. xxviii ;
- for 1925: 1926 Cmnd. No. 2717 Vol. xxix;
- for 1926:1927 Cmnd. No. 2971 Vol. xxv427;
- for 1927: 1928 Cmnd. No. 3174 Vol. xxv227.;
- for 1928:1929 Cmnd. No. 3426 Vol. xxx;
- for 1929: 1929-30 Cmnd. No.3049 Vol. xxx;
- for 1930: 1930-31 Cmnd. No. 3962 Vol.xxxii;
- for 1931:1931-32 Cmnd. No.4187 Vol.xxvi;
- for 1932: 1933-34 Cmnd. No. 4450 Vol. xxvi;
- for 1933: 1933-34 Cmnd. No.4710 Vol. xxvi ;
- for 1934: 1934-35 Cmnd. No.4997 Vol. xxii;
- for 1935:1935-36 Cmnd. No.5277 Vol. xxv;
- for 1936: 1936-37 Cmnd. No.5560 Vol.xxx;
- for 1937:1937-38 Cmnd. No.5859 Vol. xxvii;
- for 1938: Cmnd. No.6135;
- for 1947: *Nat Arch* L.C.O. 4/162;
- for 1950: 1950-51 Cmnd. No.8404 Vol. xxvi. 831;

for 1951: 1951-52 Cmnd. No.8567 Vol. xxiv 547.;
for 1952: 1952-53 Cmnd.8867 Vol. xxiii 755;
for 1953: 1953-54 Cmnd. No.9284;
for 1954:1955-56 Cmd.9531 Vol. xxxv;
for 1955: 1955-56. Cmnd. No. 224 Vol.35;
for 1956: 1956-57 Cmnd. No. 224 Vol. 26;
for 1957: 1957-58 Cmnd. No. 434. Vol.24;
for 1958:1958-59 Cmnd.802 Vol.25;
for 1959: 1960-61 Cmnd. No. 1126. Vol. 27;
for 1960: 1960-61 Cmnd. No. 1745 Vol. 27;
for 1961: 1961-1962 Cmnd. Vol. 30;
for 1962: 1962-63 Cmd. 2055. Vol. 30;
for 1963: 1964-65 Cmnd. No.2384 Vol.28;
for 1964: 1964-65 Cmnd. No.2666 Vol.28;
for 1965: 1966-67 Cmnd. No.3029 Vol.57;
for 1966: 1966-67 Cmnd. No.3344 Vol.57;
for 1967: 1967-68. Cmnd. No.3698 Vol.38;
for 1968: 1968-69 Cmnd. No.4112 Vol.52;
for 1969: 1970-71. Cmnd. 4416 Vol.29;
for 1970: 1970-71 Cmnd. No.4472 Vol.29.

House of Commons Debates

H.C. Deb vol CCIV (3rd Series) cols 331 and 346 13 February 1873
H.C. Deb vol CCVI (3rd Series) cols 641 and 667 9 June 1873
H.C. Deb vol CCVI (3rd Series) cols 1587-8 and 1590 30 June 1873

National Archive Materials

(A) Judges' Notebooks (J 114)

J 1114/1. T. Eastham K.C. (1944-48)
J 1114/2. T. Eastham K.C. (1945-46)
J 1114/3. T.Eastham K.C. (1946-48)
J 1114/4. T.Eastham K.C. (1946-48)
J 1114/5. T.Eastham K.C. (1947-49)
J 1114/6. T.Eastham K.C. (1947-49)
J 1114/ 7.T.Eastham K.C. (1947-49)
J 1114/ 8.T.Eastham K.C. (1947-49)
J.114/14. T.Eastham K.C. (1948-50)
J.114/15. T.Eastham K.C. (1950)
J.114/16. T.Eastham K.C. (1950-51)
J.114/17. T.Eastham K.C. (1950-52)
J.114/19. T.Eastham K.C. (1950-53)
J.114/21. T.Eastham K.C. (1951-53. 1955)
J.114/24. T.Eastham K.C. (1946-48)
J.114/28. T.Eastham Q.C. and Mr J.H. Bassett Q.C. (1953-55)
J.114/31. T.Eastham Q.C. and Sir Walker Carter Q.C. (1954-57)
J.114/34. Sir Walker Carter Q.C. (1954; 1956-59; 1962-64)
J.114/35. Sir Walker Carter Q.C. (1955-58; 1960)

J.114/41. Sir Walker Carter Q.C. (1959-1963).
J.114/45. Sir Walker Carter Q.C. (1959-1963).
J.114/47. Sir Walker Carter Q.C. (1965-66).
J.114/49. Sir Walker Carter Q.C. (1963-66)
J.114/51. Sir Walker Carter Q.C. (1967)
J.114/52. Sir Walker Carter Q.C. (1967-68)
J.114/50. Sir Bret Cloutman VC, Q.C. (1966-1968)

(B) Minute Books, J.116 Series

J.116/1

Sir Walker Kelly-Carter Q.C. Minute Book No. 4 (1959-62)

J.116/2

Sir Walker Kelly-Carter Q.C. Minute Book No. 5 [1962-1965]

Sir Walker Kelly-Carter Q.C. Minute Book No. 5 [January-March 1965]

J.116/3

Sir Walker Kelly-Carter Q.C. Minute Book No.6 Court "C"

[March 1965-October 1967]

Sir Walker Kelly-Carter Q.C. Minute Book No. 7 Court "C"

[January 1967-October 1967]

(C) Case Files: Supreme Court of Judicature: Official Referees and Successors

J.115/1: Cowley Concrete Ltd v Alderton Construction Co.Ltd. (1962. Unreported)

J.115/6: Alloy and Fibreboard Co Ltd v F. Superstein (1965. Unreported)

J.115/10: Gloucestershire County Council v Henry William Richardson and the Ocean
Accident and Guarantee Corporation Ltd (1966)

J.115/23: A.G. Baxter (Stotfield) Ltd v J.S. Dunne (1967 Unreported)

J.115/28: Alexander and Angell Ltd v F.C. Pilbean (1968 Unreported)

J.115/49: A.D. Bogen and Associates v D.T. Hunneyball and Rossal Estates (1973.
Unreported)

J.115/56: F. Golf and Sons Ltd v Bentley Golf and Country Club Ltd (1974. Unreported)

(D) Lord Chancellors Office Files

LCO 1/73 Official Referees and their office, appointment, salaries and duties. 1875-87

LCO 2/1710 Administration of Justice Bill 1932: question of appeals from Official
Referees; Draft Bills, general correspondence, memoranda, etc. (1930-32)

LCO 2/1734 Appeals from Referees: question of altering Rules consequent on the
Administration of Justice Act 1932 s.1; Rules of the Supreme Court (No.4),1932;
Appeals from Official Referee's Order,1932.(1932-33)

LCO 2/5976 Official Referee's: Note by Sir Tom Eastham on Recommendations of the
Second Interim and Final Reports of the Evershed Committee. (1953-56)

LCO 2/6077 Administration of Justice Act ,1956, s.15 ; Jurisdiction of Official Referee s,
Masters etc, appeals form Official Referee s and Masters

LCO 2/7739 Official Referees' Title: suggestions for alteration. (1951-60)

LCO 4/152. Official Referees: report on the work of the Official Referee's Court.
Suggestions for improving the work status and salaries. (1920-45)

L.C.O. 4/153. Judicial Officers: King's Bench, Taxing and Lunacy Masters, Registrars,
Probate, Admiralty, Bankruptcy and Companies (Winding-up) and Official Referees.
(1937-48)

LCO 4/154 Judicial Officers: Permanent Secretary Lord Chancellor, King's Bench,
Chancery, Taxing and Lunacy Masters, Official Referees, Official Solicitor and Assistant

Official Solicitor, Lunacy Visitors, Senior Medical Commissioners, Senior Legal Commissioners, Probate Registrars, Assistant Judge Advocate General, Vice Judge Advocate, Clerks of Assize. General

LCO 4/417 Official Referees: Appointment of Deputies and Question of Temporary Assistance

LCO 1/73. Official Referees and their offices, appointment, salaries and duties. (1875-87)

HO 45/17674. Honours: Other Matters: Conferring of title "His Honour" on Official Referees of the Supreme Court of Judicature and of place and precedence next after Knights Bachelor (1937-38)

PRO 69/269 Supreme Court of Judicature: Official Referees' Court

Private Collection, Lambeth Palace

Papers of Roundel Palmer, Lord Selbourne

89. MS 1866. ff.75-78 *Papers of Lord Selbourne.*

84. MS 1865. f.259 *Personal and Political Correspondence of Lord Selbourne.*

26th June 1872-17 May 1873. f.259 *Papers of Lord Selbourne*

Books

Abel R.L., *The Politics of Informal Justice: The American Experience.* (New York: Academic Press, 1982)

Auerbach J.S., *Justice without Law? Resolving Disputes Without Lawyers.* (Oxford: Oxford University Press, 1983)

Cranston R., *How Law Works.* (Oxford: Oxford University Press, 2006)

Fay E., *Official Referees' Business.* (London: Sweet & Maxwell, 2nd ed, 1988)

Heuston R.F.V., *Lives of the Lord Chancellors 1885-1940* (Oxford: Clarendon Press, 1964)

Heuston R.F.V., *Lives of the Lord Chancellors 1940-1970* (Oxford: Clarendon Press, 1987)

Llewellyn K.N. and Hoebel E.A., *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma, 1941)

Nader L., *The Life of the Law: Anthropological Projects* (California: University of California Press 2002)

Nye J.S., *The Powers to Lead* (Oxford: Oxford University Press, 2008)

Preston T., *The Supreme Court of Judicature Act 1873.* (London: William Amer, 1873)

Roberts S. and Palmer M., *Disputes Processes.* (Cambridge: Cambridge University Press, 2005)

Palmer R., *Memorials Personal and Political 1865-1895* (London: Macmillan & Co, 1898)
Vol. 1

Stevens R., *The English Judges: Their Role in the Changing Constitution.* (Oxford and Portland, Oregon: Hart Publishing, 2005)

Smith R., *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s* (London: Legal Action Group, 1996)

Woolf H., *The Pursuit of Justice* (Oxford: Oxford University Press, 2008)

Zuckerman A. and Cranston R., *Reform of Civil Procedure 'Essays on 'Access to Justice.'* (Oxford, Oxford University Press, 1995)

Zuckerman A., *Civil Justice in Crisis* (Oxford: Oxford University Press, 1999)

Reference Books

Mathew H.C.G., *Oxford Dictionary of National Biography* (Oxford: Oxford University Press 2004-5). Available online at: <http://www.oxforddnb.com/view/printable/33643>

Journals

- Bakke H. and Solomon M., (1989-1990) 'Case Differentiation: an approach to individualised case management' 74 Judicature 17
- Bok D., (1983) 'A Flawed System of Law and Practice Training' 33 Journal of Legal Education 570
- Burrows R., (1940) 'Official Referees' 56 Law Quarterly Review 504
- Colleen H., (2008) 'More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform.' Civil Justice Quarterly 98
- Cranston R., (2007) 'Complex Litigation; The Commercial Court' Civil Justice Quarterly 190
- Fiss O., (1984) 'Against Settlement' 93 Yale L.J. 1073.
- Galanter M., (1994) 'How to Improve Civil Justice Policy' 77 Judicature 185
- Galanter M., (1986) 'The Emergence of the Judge as a Mediator in Civil Cases' 69 Judicature 5
- Galanter M., (1985) 'A Settlement Judge is Not a 'Trial Judge': Judicial Mediation in the United States' 12 Journal of Law and Society
- Hudson-Tyreman A., (2008) 'Encouraged, Pushed or forced-The Order of the day?' 24 Construction Law Journal 2
- Mr Justice Jackson R. (2007), 'Annual Report for the Technology and Construction Court' 2005/6. 23 Construction Law Journal 1
- Kakalik J.S., (1997-98) 'Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act.' 49 Alabama Law Review 17
- Lauer E.J., (1928) 'Conciliation-A Cure for the Law's Delay,' 156 Annals 55.
- Newbolt F., (1923) 'Expedition and Economy in Litigation' 39 Law Quarterly Review 427)
- Pound R., (1912-1913) 'The Administration of Justice in the Modern City' 26 Harvard Law Review 302
- Resnick J., (1982) 'Managerial Judges' 96 Harvard Law Review 374.
- Roberts S., (1993) 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship' 56 Modern Law Review 452
- Ryan S.M and Wickhem J.C., (1954) 'Pre-trial Practice in Wisconsin Courts,' Wisconsin Law Review 24
- Sander F.E.A., (1976) *Variations of Dispute Processing* 70 Federal Rules Decisions 111
- Strine Jr. L.E., (2003-2004) 'Mediation-Only' Filings in the Delaware Court of Chancery: Can New value be Added by one of America's Business Courts?' 53 Duke Law Journal 585.
- Silberman L. (1988-89) 'Judicial Adjuncts revisited: the Proliferation of Ad Hoc Procedure' 137 University of Pennsylvania Law Review 2131
- Zander M., (1995) 'Are There Any Clothes for the Emperor to Wear' 145 New Law Journal 154
- Zander M., (1997) 'Woolf on Zander' 147 New Law Journal 768
- Zuckerman A.A.S., '(2006) A Colossal Wreck-the BCCI-Three Rivers Litigation' 25 (Jul) Civil Justice Quarterly 287

Newspapers

- The Times* 22 April 1869 p.8. Issue 26418; col. F
The Times 4 December 1872 p.9. Issue 27551; col. C
The Times 24 July 1877 p.11.issue:29002; col. F
The Times 16 August 1880 p.11 Issue 29961; col. G
The Times 10 August 1892 p.13.Issue 33713
The Times 20 February 1954 p.3;Issues 52861; col. E
The Times 15 September 1945.p.2.issue:50248; col. D
The Times 14 July 1953.p.2.issue:52673; col. D
The Times 23 March 1956.p.6.issue:53487; col. C
The Times 30 January 1963; p. 6 Issue 55612; col. A
The Times 31 December 1977; p. 14 Issue 60199; col. G.
The Times 17 January 1978 p.17 Issue 60212; col. E.
The Times 10 April 1985 p.12 Issue 62108; col. G
The Times 20 April 1985 p.10 Issue 62117; col. G

Copy of Correspondence regarding Judicial Statistics

Original Message via e-mail

From:-VOLLMER, Patrickmailto:VOLLMER@parliament.uk
To: MICHAEL P REYNOLDSmailto:michaelpreynolds@btinternet.com
Sent: Wednesday, February 01,2006 5:05 PM
Subject : Civil Judicial Statistics

Dear Mr Reynolds,

I have been following up your request for information on civil judicial statistics for 1939 to 1949. The readily available indices of command and parliamentary papers do not contain any entries for civil judicial statistics for the years in question: the publication of government statistics as command papers has varied, but the indices should have picked up the publication of judicial statistics regardless of format. The Department for Constitutional Affairs has been asked for similar figures in the past, and have been informed by the Social Sciences and Official Publications section of the British Library that nothing would seem to have been published between 1939 and 1949. According to the British Library, it was not uncommon for the publication of government statistics to be suspended during the War years, starting around 1938 and resuming somewhat belatedly after the War was over. The first edition of statistics published after the War often contained a summary of the figures for the intervening years: in this case, the Civil Judicial Statistics for 1949 (Cmd 8186), contained comparative figures for the years 1938 to 1949 for appellate court proceedings and for courts of first instance, but not for any other area. The British Library could not say whether or not any other figures were collected during the period. However, some other figures may have been collected, as there are references to civil judicial statistics for certain years between 1939 and 1949 on the catalogue of the National Archives (<http://www.nationalarchives.govuk/catalogue/default.asp>). You may therefore like to contact the National Archives to view their holdings.

I hope this information is of use to you.

Yours sincerely,

Patrick M. Vollmer
Senior Library Clerk
Research Services
House of Lords
London, SW1A 0PW

APPENDICES

CONTENTS

Chronologies	14
Referee management chronology	14
Outline and general chronology	16
Sample <i>Return of Judicial Statistics 1880</i>	19

Additional tables

Table 1 Official Referees in post	20
Table 2 Trials in the post war period	21

Data Collection: Official Referees' Notebooks and Minute Book records

Table 3: Walker Carter QCittings: Minute Books 4 and 5	22
Table 4: Walker Carter QC's Notebook [1959-1963]	22
Table 5: Walker Carter QC Minute Book No. 4 [1959-1962]	23
Table 6: Walker Carter QC Minute Book No. 5 [1962-1965]	37
Table 7: Walker Carter QC notebook [1959-1963]	38
Table 8: Walker Carter QC notebook [1962-1965]	39
Table 9: Walker Carter QC Minute Book No. 5 [January-March 1965]	40
Table 10: Walker Carter QC Minute Book Court "C" [March 1965-October 1967]	42
Table 11: Walker Carter QC Minute Book No. 7 Court "C" [January 1967-October 1967]	50
Table 12: Walker Carter QC Notebook [1967-1968]	53
Table 13: Walker Carter QC Notebook [1967]	53
Table 14: Sir Bret Cloutman QC Notebook [1966-1968]	53
Table 15: Settlement in the course of the trial (1959-1962)	54
Table 16: Settlement in the course of the trial (1965-1967)	57

Judges' Notebooks J.114 Series Analysis

Judges' Notebooks J.114/3-4 and 21 (1946-48)	60
Judges Notebook No. 55 (May 1950 – December 1951)	62
Judges Notebook No. 57 (May 1950 – July 1951)	65
Judges Notebook No. 58 (April 1951 – June 1952)	72

Judges Notebook No. 60 (January 1951 – March 1952)	78
Judges Notebook No. 64 (March 1952-October 1953)	89
Judges Notebook No. 70 (February 1954 –January 1957)	95
Judges Notebook No. 75 (January 1955 – November 1960)	107
Judges Notebooks J.114/2 (March - October 1945)	113
Judges Notebooks J.114/1 (November 1944 - October 1946)	114
Judges Notebook No. 71 (March 1954 – November 1964)	115
Statistical data spreadsheets	126
1. Civil Judicial Statistics Analysis: Official Referees: 1919-70	
2. Backlog analysis 1919-70	

REFEREE CASE MANAGEMENT CHRONOLOGY

1867-1873	<p>Judicature Commissioners consider referral powers under the Common Law Procedure Act 1854 and the problem of non-compulsory referral to an arbitrator.</p> <p>Further consideration given to Chancery referrals to Chief Clerk and difficulties with lay jury in understanding more technically complex cases.</p> <p>Judicature Commissioners recommended compulsory referral in certain cases. Subordinate judicial functions and powers; limited trial function</p>
1883	RCS Order 36 Rule 50 - Power to order discovery and production of documents
1889	Powers to make orders as to costs both at interlocutory stage and judgment
1889	Beginnings of Senior Official Referees management powers. Senior referee required to make return of cases to the Lord Chancellor through the Lord Chief Justice.
11 January 1889	RSC 1883 Order 47A (December 1888) transfer between Referees
1890s	Referees had their own Courts and Chambers. Chambers were in Portugal Street behind the RCJ
1893	Power to order an inspection of property (<i>McAlpine v Calder</i> 1893 1QB 545).
1920	<p>Newbolt commences series of experiments with expert witnesses and initiates new directions to expedite process.</p> <p>Newbolt expresses private concern to Lord Chancellor over <i>proportionality</i> of cases in terms of cost/value.</p>
1921	First record of use of expert determination by Newbolt.
1922	First record of <i>friendly business discussions</i> in Chambers
1922	Use of directions hearings as caseflow management conferences after issue of Writ and pre-trial meetings (second summons for directions) to narrow issues and encourage settlement
1923	Newbolt describes how he appointed single joint expert in a case (1923) 34 LQR427 and (1926) 42 LQR 52
1954	Referrals being tired in a "matter of weeks." (Eastham's memorandum)

1968	<p>Case management powers</p> <p>Summons for Directions was issued when case was transferred and entered in the rota. Allocated to an Official Referee. Short Summons lasted 15 minutes, longer Summons was over 15 minutes.</p> <p>Taken out within 14 days of transfer to Official Referee</p> <p>General directions given by O.R.</p>
	<p>Practice Directions 1968 1WLR425 and 1WLR1425 - if parties could not state their requirements there could be penalties in costs. Official Referee would give directions.</p>
	<p>If expert evidence was adduced parties should produce reports and plans for agreement of the other side or if there was no agreement then deliver a statement as to what was not agreed.</p> <p>Practice Direction of Sir Walter Carter 8 July 1968</p> <p>Notice given to solicitors 7 days before trial to advise court if likelihood of settlement.</p>
	<p>The standard orders on directions given by Official Referees encompassed:</p> <p>Further discovery verified by Affidavit; Security for costs; Appointment of a Court expert under Order 40;(rarely used) Inspection and preservation of property; Order for Interrogatories.</p>

Note: 1920-1923 is the key creative period for the referees from which the research questions emerge.

OUTLINE AND GENERAL CHRONOLOGY

	<p>Section 82 Judicature Act 1872 created the office of Official Referees</p> <p>Section 25 Courts Act 1971 abolished the office of Official Referees whence they became circuit judges.</p>
1854	<p>Section 3 Common Law Procedure Act 1854 judge could refer matter of account to an arbitrator or officer of the Court called a "Referee". Award or certificate of such referee enforceable as a finding of a jury.</p>
1867	<p>First Report of the Judicature Commissioners recommending appointment of Official Referees.</p>
1873	<p>Judicature Act (Third Bill presented by Lord Selbourne) Referee judgement could be set aside like the verdict of a jury. Rules of the Supreme Court drafted Mr Anderson appointed by Lord Selbourne.</p>
1876	<p>Three other referees appointed</p> <p>Judgments subject to review on findings of facts - <i>Cruickshank v Floating Swimming and Baths</i>.</p>
1877	<p>Hearing conducted in referee's private room in Portugal Street see: <i>Leigh v Brooks</i> 1877. More evidence of use after 1892.</p>
1883	<p>Subordinate judicial powers confirmed as to : Evidence at trial; Incorporation of referee report by High Court judge.</p>
1887	<p>Result of referee enquiry report having status of jury verdict. see <i>Baronness Wenlock v River De</i> 1887</p>
1889	<p>Powers as to costs. Establishment reduced from four Referees to three.</p>
1894	<p>Section 1 (5) Supreme Court Judicature Act 1894 provided that an appeal from a judgment of a Referee was to a Divisional Court. Order for Judgment by a Referee could be set aside by a Divisional Court see <i>Clark v Sonnenschein</i> 25 QBD 226 compare with Administration of Justice Act 1932 which provided for a direct right of appeal to the Court of Appeal itself on matter of law.</p> <p>Counsel remained seated during hearings before the Referee. See Sir Ronald Burrell's article in the 1940 Edition 56LQR509.</p>
1900	<p>Referees moved from Portugal Street to the West Wing of the Law Courts which became known as the Official Referees Corridor.</p>

1920-27	Official Referees Pollock, Newbolt and Scott.
1921	Post-War peak of 507 cases that year following acquisition of non-jury list.
1925	Sections 88 and 89 Supreme Court Act 1925.
1932	Administration of Justice Act appeals not by way of case stated to the Divisional Court but to the Court of Appeal therefore argument that Referees became fully fledged Judges.
1938	Style of "His Honour" bestowed.
1940	Sir Ronald Burrows article in LQR "Large number of non jury actions and same work as High Court Judges".
1942	House of Lords decided against the Referees doing professional negligence work. See <i>Ossenton v Johnston</i> (1942) but Parliament after Evershed Report gave a right of appeal against Official Referee judgements in fact and law.
1948	Establishment increased from 3 to 4.
1951	Referrals: 465 cases.
1953	Evershed Report acknowledged referee's position and suggested wider jurisdiction.
1956	Administration of Justice Act following Evershed reports. Question of status. Under Section 9 Official Referees to be appointed by the Crown. Required to take a judicial oath. Duration no longer determined by the Lord Chancellor by retiring at 72 years of age. Section 15 Administration of Justice Act 1956 Right of Parties to choose Referee (Specials) abolished. Numbers of Referees were reduced from 4 to 3.
1965	Referees moved from the Royal Courts of Justice West Wing to Victory House in Kingsway.
1969	Return to RCJ in three Courts in the West Wing.
1970	901 referrals. Beeching Report recommended that they be appointed Circuit Judges and sit as Deputy High Court Judges.
1971	Courts Act. Official Referee title abolished.
1975	Two new Courts constructed on the third floor, West Wing of the Royal Courts of Justice. They had three Courts on the third floor and two Courts on the second floor.

1982	Originating jurisdiction. Litigants could start action in this Court therefore it became a specialist Court but not on a real par with the commercial Court as described by Edgar Fay.
1983	Number of ORs increased back from 3 to 4 again.
1984	Delays in ORs out of control. See Donaldson's remarks in <i>NRHS v Derek Crouch</i> [1984] QB644 at 674.
1985	Over 1,000 cases.
1988	ORs moved to St Dunstons House, Fetter Lane

Return of *Judicial Statistics 1880*

Returns of the proceedings before the Official Referees appointed under Section 83 of the Judicature Act 1873, made by the Referees, for the year ending the 31st October 1880, show the nature and result of the References heard or otherwise disposed of in the same period ; the numbers are also given for 1878—9:

<u>Proceedings.</u>	1879—80. Number.	1878—9. Number.
Number of References appointed for hearing, including Remnants -	139	91
Defended -	76	44
Undefended -	1	2
Number of References part heard -	34	28
Withdrawn - -	12	8
Standing over by order of Court	5	2
Number of Remnants -	11	12
Total:	139	91

Nature of the References heard and disposed of.

On Promissory Notes, Bills of Exchange, &c.	1	
On bonds - -	2	
For goods sold and delivered -	4	5
For work and labour done -	21	10
For money lent, paid, advanced, &c. - -	10	2
For compensation for injuries to property from negligence	1	1
For breach of contract, &c. -	3	5
For recovery of land (Ejectments)		
For breach of covenant -	7	4
For trespass relative to land, houses, &c. -	1	2
Interpleader Issues -		
Issue from Court of Equity - - - -	13	10
For recovery of rent -	3	1
Other suits	11	6
Total	77	45

TABLE 1
OFFICIAL REFEREES IN POST 1919-1970

Sir Francis Newbolt	1920-1936
George Scott	1920-1933
Sir William Hansell	1927-1931
Sir Roland Bosanquet	1931-1954
Charles Pitman	1933-1945
Sir Tom Eastham	1936-1954
John Trapnell	1943-1949
Herbert Samuels	1945-1947
Sir Brett Cloutman	1948-1963
Sir Lionel Leach	1948-1956
Sir Hubert Hull	1949-1950
John Caswell	1951-1959
Sir Walker Kelly Carter	1954-1971
Percy Lamb	1959-1969
Sir Norman Richards	1963-1978
Sir William Stabb	1969-1983

TABLE 2**Trials in the post war period**

Year	Referees in post	Trials in that year	Average number of trials per referee
1947	3	133	44
1948	5	258	51
1949	5	225	45
1950	5	289	58
1951	5	293	59
1952	5	350	70
1953	5	316	63
1954	4	307	76
1955	4	302	75
1956	4	243	61
1957	3	182	61
1958	3	167	56
1959	3	158	53
1960	3	154	51

DATA COLLECTION (CHAPTER 5 APPENDIX)

Data Collection: *Minute Book/Judges' Notebook Analysis* [1959-62]

Data Analysis of Minute Books Nos. 4 & 5

Cases Not Recorded in Minute Books [1959-62]

Data Collection: *Minute Book/Judges' Notebook Analysis* [1965-67]

Cases Not Recorded in Minute Books [1965-67]

TABLE 3

Sir Walker Kelly-Carter Sittings: Minute Books 4 and 5

Year	1959	1960	1961	1962
Days sat According to Minute Books	68	76	103	40
Days sat According to Minute Books and Notebooks	80	76	103	44

TABLE 4

Sir Walker Carter's Notebook [1959-1963]

Case Name	Date	Type	Time Occupied by referee
<i>Pugh v Brisford Entertainment Ltd & Anor</i> ¹	12 th January 1959	Dispute as to agricultural holding and breach of tenancy agreement	Dys 1-8 Total: 8 days
<i>Sims and Russell Ltd v Russell & Others</i> ²	26 th April 1959	Architects fees dispute.	Dys: 1-4 Total: 4 days

¹ *Nat. Arch J114/41 Official Referee's Notebook Sir Walker Kelly-Carter Q.C. [1959 to 1963] p.1 [Dec. 2006 Series CIMG 0618 .jpg]*

² *Nat. Arch J114/41 Official Referee's Notebook Sir Walker Kelly-Carter Q.C. from 1 1959 to 1962, p. 34. [Dec 2006 Series CIMG 0623.jpg]*

TABLE 5

**Official Referee's Court Minute Book No. 4. Sir Walker Kelly-Carter Q.C.
[1959-1962]**

Case Name	Date	Type of Case	Time occupied by the Referee
<i>S Kaplin & Son (Upholsterers) Limited v Parkins</i> ³	30 April 1959	Building defects and diminution in value	Dy 1 4hrs. 33mins. Dy 2 2hrs. 23mins. Total: 6hrs. 56mins.
<i>Martin French v Kingswood Hill Ltd</i> ⁴	6 May 1959	Preliminary issues: claim for professional fees and question of equitable set off	Dy 1: 4hrs. Dy 2: 1hr. 25mins. Dy 3: 20mins. Total: 5hrs. 45mins.
<i>Dowlas Contractors)Ltd v Barnes</i> ⁵	12 May 1959	Claim for moneys due under various invoices and extra work	Dy 1 5hrs. 55mins. Dy 2 1hr 35mins. Total: 7hrs. 30mins.
<i>Been Twownes v University College of Wales Aberyswyth</i> ⁶	27 May 1959	Claim for compensation after de-requisitioning under Section 2(1)(b) Compensation (Defence) Act 1959 and Section 18 Landlord and Tenant Act 1927.	Dy 1 1hr 45mins. Total: 1hr 45mins.
<i>Burton Mayhew & Co v Pierson</i> ⁷	28 May 1959	Damages for breach of contract	Dy 1 + 2: 6hrs. 3mins. Dy 3: 10mins. Total: 6hrs. 10mins.
<i>Midlands Electricity Board v Holder</i> ⁸ [Sitting at Shire Hall, Shrewsbury]	3 June 1959	Building contract claim	Dy 1 2hrs. 10mins. Total: 2hrs. 10mins

³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 CIMG 0160jpg and SH 101353-4jpg

⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 [Oct 2006 Series; HPIM 1964jpg] and J114/34 Official Referee's Notebook; Sir Walker Carter, Q.C. SH 101355jpg

⁵ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.96 [Oct 2006 Series; HPIM 1967jpg]

⁶ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.96 [Oct 2006 Series; HPIM 1968jpg]

⁷ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.96 [Oct 2006 Series; HPIM 1969jpg]

⁸ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.96 [Oct 2006 Series; HPIM 1970jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Re: a Lease of St Martins Theatre London WC2 and re Landlord and Tenant Act 1954</i> ⁹	8 June 1969	Enquiry and Report; inquiry into the extent of defective electrical items in the theatre and consequent diminution in value attributable to state of disrepair.	Dy 1: 4hrs. 25mins. Dy 2: 4hrs. 27mins. Dy 3: 4hrs. 30mins. Dy 4: 4hrs. 10mins. Dy 5: 6hrs. Dy 6: 2hrs. 25mins. Total: 25hrs. 57mins.
<i>Motor Bodies (Stratford Limited) v Poplar Furniture Manufacturing Company Limited</i> ¹⁰	16 June 1959	Claim for damages to repair a vehicle.	Dy 1: 3hrs. 53mins. Dy 2: 2hrs. 15mins. Total: 6hrs. 8mins.
<i>Sheridan and Hurley v Corlentin</i> ¹¹	18 June 1959	Building claim	Dy 1: 5 mins. Total: 5 mins.
<i>Crimples v Britton</i> ¹² Sitting at Old Council House, Bristol	22 June 1959	Building claim; defects and breach of Building Regulations	Dy 1: 2hrs. 5mins. Dy 2: 4hrs. Total: 6hrs. 5mins.
<i>Rye Care Ltd v Mercantile Refrigeration Ltd</i> ¹³	24 June 1959	Building Claim. Case used Scott Schedule device.	Dy 1: 4hrs. 10mins. Dy 2: 4hrs. 45mins. Dy 3: 4hrs. 30mins. Total: 13hrs. 25mins.
<i>Lloyd Jones v Gilbert</i> ¹⁴	30 June 1959	Building Claim	Dy 1: 3hrs. 40mins. Total: 3hrs. 40mins.
<i>Anglo Overseas Transport Co Ltd v S.A.Sampson Ltd</i> ¹⁵	6 July 1959	Commercial dispute as to payment for two export and one import order. Settlement agreed in sum of £1818.13.3 in respect of claim for £4,368.13.3.	Dy 1: 1hr. Total: 1hour
<i>Hardy v Doyle</i>	13 July 1959	Building claim. Judgment	Dy 1: 4hrs.

⁹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 [Oct 2006 Series; HPIM 1971-1975jpg]

¹⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 [Oct 2006 Series; HPIM 1975-1976jpg]

¹¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.29 [Oct 2006 Series; HPIM 1977jpg]

¹² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.30 [Oct 2006 Series; HPIM 1977jpg]

¹³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.34 [Oct 2006 Series; HPIM 1979jpg]

¹⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.38 [Oct 2006 Series; HPIM 1981jpg]

¹⁵ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.38 [Oct 2006 Series; HPIM 1983jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Bole v Doyle (Consolidated)</i> ¹⁶		for £629 and £569 respectively plus interest at 5%.	Total: 4 hrs.
<i>Wiseman v Gildes</i> ¹⁷	15 July 1959	Dilapidations and loss of rent	Dy 1: 4hrs. 47 mins. Dy 2: 30mins. Total: 5hrs.17 mins.
<i>Cousin Brothers (Machine Tool Specialists)Ltd v Gladwell Rowe Ltd</i> ¹⁸	16 July 1959	Defective machinery	Dy 1: 4hrs.18 mins. Dy 2: 4hrs. 35 mins. Dy 3: 4hrs. 15 mins. Total: 13hrs.8mins.
<i>Bilton & Son v Mason</i> ¹⁹	Part heard 21 July 1959	Building Claim	B/fwd: 14hrs. 55 mins. Dy 4: 3hrs. 33mins. Total: 18 hrs.28mins.
<i>Kersey vHaller</i> ²⁰ Sitting at Crosfield Hall, Romsey,Hampshire	23 July 1959	Building claim	Dy 1: 6hrs. 45 mins. Total: 6hrs. 45mins.
<i>Homes vTomaseli</i> ²¹	30 July 1959	Money Claim	Dy 1.: 2 hrs. 15mins. Total: 2hrs.15 mins
<i>Horton & Anor. v AC</i> ²² <i>Building Ltd</i> ²³ [Transfer from O.R. Court III]	2 October 1959	Building claim	Dy 1: 4hrs. 15 mins. View: 4 hrs. Dy 2: 4hrs. 20 mins. Dy 3: 3hrs. 40 mins. Dy 4: 3hrs. 58mins. Dy 5: 4hrs. 32mins. Dy 6: 3hrs. 50 mins. Dy 7: 5hrs. 51mins Dy 8: 1hr. 50mins. Total 36hrs. 26mins.
<i>Arnold Meyrick Limited v P E Thomas</i> ²⁴	26 October 1959		Dy 1 3mins. Total: 3mins.

¹⁶ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.43-44 [Oct 2006 Series; HPIM 1984jpg]

¹⁷ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.45 [Oct 2006 Series; HPIM 1985jpg]

¹⁸ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.48 [Oct 2006 Series; HPIM 1986jpg]

¹⁹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.51 [Oct 2006 Series; HPIM 1988jpg]

²⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.53 [Oct 2006 Series; HPIM 1989jpg]

²¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.56 [Oct 2006 Series; HPIM 1990jpg]

²² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.65 [CIMG 0166]

²³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.57 [Oct 2006 Series; HPIM 1995jpg]

²⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p. 63 [CIMG 0164]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>J.J. Sullivan (Piccadily) Limited v J. Conrad & S. Conrad</i> ²⁵	28 th October 1959	Money claim	Dy 1: 4mins Total: 4 mins.
<i>Dewston v Rowson Dunbar & Cldesdale Ltd</i> ²⁶	2 November 1959	Building claim	Dy 1: 4hrs. 8 mins. Dy 2: 1hr. 30 mins. Dy 3: 4hrs. 29 mins. Dy 4: 4hrs. 41mins. Dy 5: 1hr. 22mins. Dy 6: 2 mins. Total: 16hrs 12mins.
<i>Sheridan Hurley v Corentun</i> ²⁷	9 November 1959	Building Claim	Dy 1: 4hrs 30mins. Dy 2: 2hrs 53mins. Total: 7hrs. 23mins.
<i>G Swinden & Co Ltd v William Franklin Sterling Car Hire Services Ltd. Launderette (High Road) Limited. Launderette (Borehamwood) Limited</i> ²⁸	19 November 1959	Action on an account	Dy 1: 3hrs. 16 mins. Dy 2: 4hrs. 26 mins. Dy 3: 2hrs. 16 mins. Total: 9hrs 58mins
<i>R.C. Clarke v Gallery Estate Ltd</i> ²⁹	25 November 1959	Building Claim: Final A/c dispute	Dy 1: 3hrs. 16mins Dy 2: 2hrs. 10mins. Total: 5hrs.26mins.
<i>H. G. Dunford & Bros v E Sutton</i> ³⁰	1 st December 1959	Building claim	Dy 1: 2hrs 25mins. Total: 2hrs 25mins
<i>British Electric Traction Co Ltd v Thomas Edwin Langton and Luxury Land Cruises Ltd</i> ³¹	7 December 1959	Holiday Claim, enquiry and report	Dy 1: 4hrs. 21 mins. Dy 2: 4hrs. 20 mins. Dy 3: 4hrs. 27 mins. Dy 4: 4hrs. 43mins.

²⁵ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p. 65 [CIMG 0165]*

²⁶ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.67 [Oct 2006 Series; HPIM 1996jpg]*

²⁷ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.73 [Oct 2006 Series; HPIM 1999jpg]*

²⁸ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.79 [Oct 2006 Series; HPIM 2002jpg]*

²⁹ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.82 [Oct 2006 Series; HPIM 2003jpg]*

³⁰ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p85 [Oct 2006 Series; HPIM 2005jpg]*

³¹ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.87 [Oct 2006 Series; HPIM 2006jpg]*

Case Name	Date	Type of Case	Time occupied by the Referee
			Dy 5 4hrs. 30mins. Dy 6 3hrs. 39 mins. Dy 7 3hrs. 10mins Total: 29hrs 10mins
<i>M L Transport(a firm)v Horrocks</i> ³²	11 January 1960	Assessment of Damages	Dy 1: 50mins. Total: 50mins.
<i>James Atkinson and Veronica Atkinson Alandale and Celia Dale vSteer</i> ³³	20 January 1960	Action on an account	Dy 1: 4hrs 25mins Total: 4hrs 25mins
<i>George v Russell Bros (Paddington)Limited</i> ³⁴	1 February 1960 Adjourned from 15 July 1958	Building case – preliminary issues – building owner acted unreasonably in not employing builder to finish house	Dy 1 4hrs. 20mins. Dy 2 2hrs. 50mins. Dy 3 4hrs. 13mins. Dy 4 3hrs. 31mins. Dy 5 2hrs. 50mins. Total: 17hrs. 44mins.
<i>HG Thomas v Nichol</i> ³⁵	10 February 1960	Building claim	Dy 1 10mins. Total: 10mins.
<i>Alpenite Limited v Conn & Anor</i> ³⁶	15 February 1960	Building claim	Dy 1 4hrs. 28mins. Dy 2 4hrs. 28mins. Dy 3 4hrs. 25mins. Dy 4 4hrs. 33mins. Dy 5 4hrs. Dy 6 5mins. Total: 21hrs. 59mins.
<i>Charles Amos Gander v D Hooper & Anor</i> ³⁷	29 February 1960	Building claim	Dy 1 40mins. Total: 40 mins.
<i>Clifton Slipways Co Ltd v Charles Lane</i> ³⁸	2 March 1960	Building claim	Dy 1 4hrs. 30mins. Dy 2 55mins. Total: 5hrs. 25mins.
<i>JH Plant Ltd v Smithson</i> ³⁹	9 March 1960	Building claim	Dy 1 4hrs. 20mins. Dy 2 4hrs. 19mins. Dy 3 3hrs. 15mins.

³² *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.93* [Oct 2006 Series; HPIM 2009jpg]

³³ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.94* [Oct 2006 Series; HPIM 2009jpg]

³⁴ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.96* [Oct 2006 Series; HPIM 2010jpg]

³⁵ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.98* [Oct 2006 Series; HPIM 2011jpg]

³⁶ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.99* [Oct 2006 Series; HPIM 2012jpg]

³⁷ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.103* [Oct 2006 Series; HPIM 2014jpg]

³⁸ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.104* [Oct 2006 Series; HPIM 2014jpg]

³⁹ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.105* [Oct 2006 Series; HPIM 2015jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
			Total: 11hrs. 54mins.
<i>James Kinross v R H Tarrant</i> ⁴⁰	15 March 1960	Building case	Dy 1 4hrs. 30mins. Dy 2 3hrs. 25mins. Dy 3 5mins. Total: 8hrs.
<i>E K Youell & Son Ltd v Frederick Ingram</i> ⁴¹	22 March 1960	Building case	Dy 1 4hrs. 35mins. Dy 2 2hrs. 45mins. Total: 7hrs. 20mins.
<i>T Projects Limited v William Reader</i> ⁴²	29 March 1960	Building case	Dy 1 5mins. Total: 5mins.
<i>Douglas Neare & Lartner v M Howard</i> ⁴³	27 April 1960	Building claim	Dy 1 3hrs. 21mins. Dy 2 4hrs. 26mins. Dy 3 2hrs. 50mins. Total: 10hrs. 37mins.
<i>Livio Mascherpa v Direck Limited</i> ⁴⁴	4 May 1960	Dilapidations case	Dy 1 27mins. Total: 27mins.
<i>Sergios Papa Michael v H Sarva & G Sarva</i> ⁴⁵	12 May 1960	Building claim, production in bill of quantities did not disentitle the Defendant to allege bad workmanship	Dy 1 4hrs. 3mins. Dy 2 4hrs. 20mins. Dy 3 3hrs. 46mins. Total: 12hrs. 9mins.
<i>Trench Excavations Ltd v Paparall Construction Company Limited</i> ⁴⁶	30 May 1960	Building claim	Dy 1 4hrs. 10mins. Dy 2 4hrs. 22mins. Dy 3 4hrs. 33mins. Dy 4 5hrs. 27mins. Dy 5 1hr. Total: 19hrs. 42mins.
<i>Brewis P.G. v H R Atkinson & Co</i> ⁴⁷ Sitting at Newcastle	21 June 1960	Building claim – measurement of variations	Dy 1 5hrs. 13mins. Dy 2 2mins. Total: 5hrs. 15mins.
<i>The Beechwood Estates Company v Mrs L Hanbury Aggs</i> ⁴⁸	27 June 1960	Landlord and tenant claim, breach of repairing covenant	Dy 1 3hrs. 20mins. Total: 3hrs. 20 mins.

⁴⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.107 [Oct 2006 Series; HPIM 2016.jpg]

⁴¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.100 [Oct 2006 Series; HPIM 2017.jpg]

⁴² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.112 [Oct 2006 Series; HPIM 2018.jpg]

⁴³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.113 [Oct 2006 Series; HPIM 2019.jpg]

⁴⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.116 [Oct 2006 Series; HPIM 2020.jpg]

⁴⁵ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.116 [Oct 2006 Series; HPIM 2020.jpg]

⁴⁶ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.120 [Oct 2006 Series; HPIM 2022.jpg]

⁴⁷ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.122 [Oct 2006 Series; HPIM 2023.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Leslie Arthur Brooks v Ann Cooper</i> ⁴⁹	4th July 1960	Building claim	Dy 1 4hrs. 5mins. Total: 4hrs. 5mins.
<i>Edward Vernon Andrews v Greens (Wholesale China) Ltd</i> ⁵⁰	11 th July 1960	Matter of Account; Preliminary Issues	Dy 1: 4hrs. 10mins. Dy 2: 3hrs. 45mins. Dy 3: 5hrs. 10mins. Total: 13hrs. 5mins.
<i>LW Hill (Bourton) Limited v Peter Davies Pinson</i> ⁵¹	18 July 1960	Building claim Judgement by consent	Dy 1 4hrs. 55mins. Total: 4hrs. 55mins.
<i>Holbrook (Oxted) Limited v J D Miller</i> ⁵²	11 October 1960	Building claim re defective works	Dy 1 3hrs. 30mins. Dy 2 4hrs. 30mins. Dy 3 4hrs. 42mins. Dy 4 4hrs. 37mins. Dy 5 4hrs. 30mins. Dy 6 4hrs. 27mins. Dy 7 5mins. Total: 26hrs. 21mins.
<i>Lenton v City of Coventry</i> ⁵³	1 st November 1960	Building Claim: Preliminary Issues Adjourned to 21 st Feb 1961 but not heard then so must have been settled after this hearing.	Dy 1: 4hrs. 15mins Dy 2: 1hr. 30mins. Total: 5hrs. 45mins.
<i>Charles Mahoney v J W Kent</i> ⁵⁴	7 November 1960	Building claim	Dy 1 4hrs. 20mins. Dy 2 5mins. Total: 4hrs. 25mins.

⁴⁸ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.124* [Oct 2006 Series; HPIM 2024jpg]

⁴⁹ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.125* [Oct 2006 Series; HPIM 2025jpg]

⁵⁰ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.126* [Oct 2006 Series; HPIM 2025jpg]

⁵¹ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.130* [Oct 2006 Series; HPIM 2027jpg]

⁵² *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.131* [Oct 2006 Series; HPIM 2028jpg]

⁵³ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.136* [Oct 2006 Series; HPIM 2030jpg]

⁵⁴ *Nat. Arch J116/1 Official Referee's Court Minute Book No 4 p.137* [Oct 2006 Series; HPIM 2031jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Youngsigns Limited v SSB Limited</i> ⁵⁵	14 th November 1960	Building Claim	Dy 1: 4hrs. 7mins. Dy 2: 3hrs.22mins. Dy 3: 4hrs.37mins. Dy 4: 4hrs. 5 mins. Dy 5: 4hrs. 36mins. Total: 20hrs.59mins.
<i>Charles Churchill & Co Ltd v Lemark Limited</i> ⁵⁶	23 November 1960	Building claim	Dy 1 5hrs. 30mins. Dy 2 35mins. Dy 3 4hrs. 49mins. Dy 4 4hrs. 44mins. Dy 5 4hrs. 27mins. Dy 6 4hrs. 29mins. Dy 7 4hrs. 22mins. Dy 8 5hrs. 23mins. Dy 9 4hrs. 35mins. Dy 10 4hrs. 20mins. Dy 11 4hrs. 4mins. Dy 12 4hrs. 18mins. Total: 51hrs. 36mins.
<i>Heating & General Engineering Co (Catford) Limited v Joseph Richardson Limited</i> ⁵⁷	30 November 1960	Building claim No appearance by defendant. Judgment for Plf for £485.8.10.	Dy 1 12mins. Total: 12mins.
<i>Timothy Mitchell v Patrick Dempsey</i> ⁵⁸	15 December 1960	Building claim	Dy 1 4hrs. Dy 2 3hrs. 40mins. Dy 3 55mins. Total: 8hrs. 35mins.
<i>Pugh v Brisford Entertainment Limited & Anor</i> ⁵⁹	11 January 1961	Matter of an account Tillages valuations for agricultural land.	Previous hearing : 11hrs. 35mins. Dy 4 3hrs. 25mins. Dy 5 1hr. 48mins. Dy 6 4hrs. 5mins. Dy 7 3hrs. 57mins. Dy 8 4hrs. 13mins. Dy 9 4hrs. 24mins. Dy 10 1hr.

⁵⁵ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.138 [CIMG 0182 jpg]*

⁵⁶ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.142 [Oct 2006 Series; HPIM 2033jpg]*

⁵⁷ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.144 [Oct 2006 Series; HPIM 2034jpg]*

⁵⁸ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.145 [Oct 2006 Series; HPIM 2035jpg]*

⁵⁹ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.148 [Oct 2006 Series; HPIM 2036jpg]*

Case Name	Date	Type of Case	Time occupied by the Referee
			Total: 34hrs. 27mins.
<i>J Murphy & Sons Limited v Aberfren Cable & Construction Co Limited</i> ⁶⁰	13 February 1961	Building claim – excavation works	Dy 1 4hrs. 32mins. Dy 2 4hrs. 25mins. Dy 3 4hrs. 18mins. Dy 4 3hrs. 42mins. Dy 5 1hr. 15mins. Total: 18hrs. 12mins.
<i>Harper & Preston Limited v Marshall Coatings Limited</i> ⁶¹ (Official Referee sitting in Birmin.gham)	22 February 1961	Building case	Dy 1 6hrs. 30mins. Dy 2 5hrs. 28mins. Dy 3 6hrs. 55mins. Dy 4 1hr. 10mins. Total: 19hrs. 3mins.
<i>Arthur Finbar v Robert Edward Fox</i> ⁶²	27 February 1961	Building claim	Dy 1 4hrs. 35mins. Dy 2 1hr. 45mins. Total: 6hrs. 30mins.
<i>Mills Inter Commercial Limited and Anor v The Dudley Iron & Steel Company (1950)</i> ⁶³		Matter of account	Dy 1 4hrs. 25mins. Dy 2 4hrs. 22mins. Dy 3 4hrs. 42mins. Dy 4 3hrs. 40mins. Dy 5 3hrs. 45mins. Dy 6 5mins. Total: 19hrs. 59mins.
<i>Ivor Brackwell v Sutherland (Tenulite) Products Limited</i> ⁶⁴ Sitting at Loughborough	13 March 1961	Building claim	Dy 1 5mins. Total: 5 mins.
<i>Sydney Bell v S.R. Hardy</i> ⁶⁵	22 March 1961	Building claim	Dy 1 5hrs. 15mins. Dy 2 4hrs. 25mins. Dy 3 45mins. Total: 10hrs. 25mins.
<i>James Glanville & Sons Ltd v H G Winteridge & Co Ltd</i> ⁶⁶	29 March 1961	Building case	Dy 1 2hrs. 16mins. Dy 2 4hrs. 27mins. Dy 3 4hrs. 57mins. Dy 4 4hrs. 15mins.

⁶⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.153 [Oct 2006 Series; HPIM 2040.jpg]

⁶¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.156 [Oct 2006 Series; HPIM 2041.jpg]

⁶² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.161 [Oct 2006 Series; HPIM 2044.jpg]

⁶³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.163 [Oct 2006 Series; HPIM 2045.jpg]

⁶⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.167 [Oct 2006 Series; HPIM 2047.jpg]

⁶⁵ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.167 [Oct 2006 Series; HPIM 2047.jpg]

⁶⁶ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.170 [Oct 2006 Series; HPIM 2048.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
			Total: 15hrs. 55mins.
<i>Sims & Russell Limited v Russell & Ors</i> ⁶⁷	26 April 1961	Building claim	Dy 1 4hrs. 34mins. Dy 2 4hrs. 35mins. Dy 3 3hrs. 47mins. Total: 12hrs. 56mins.
<i>Harts Holiday Camps Ltd v R W Pilkington</i> ⁶⁸	15 May 1961	Building claim – defective work	Dy 1 4hrs. 32mins. Dy 2 4hrs. 27mins. Dy 3 4hrs. 25mins. Dy 4 1hr. 30mins. Total: 14hrs. 54mins.
<i>John Fletcher Suiter v W Pikta</i> ⁶⁹	7 June 1961	Building claim	Dy 1 5hrs. 13mins. Total: 5hrs. 13mins.
<i>Bernard Lamb v George H Edwards</i> ⁷⁰	12 June 1961	Building case	Dy 1 4hrs. 32mins. Total: 4hrs. 32mins.
<i>Thomas Bullock v D Rose</i> ⁷¹	14 June 1961	Building claim	Dy 1 3hrs. 5mins. Total: 3hrs. 5mins.
<i>Ian Frederick Dimbleby v Thomas Scott & IF Dimbleby v D Gatley</i> ⁷²	20 June 1961	Building claim J 114/41. Sir Walker Carter p.60. [CIMG 0625]	Dy 1 4hrs. 40mins. Dy 2 3hrs. 25mins. Total: 8hrs. 5mins.
<i>George Alfred Collie v W E Archer</i> ⁷³	26 June 1961	Building claim	Dy 1 4hrs. Dy 2 4hrs. Dy 3 2hrs. 20mins. Site Visit view: 1 hr. Dy 4 40mins. Total: 13hrs.
<i>Phelps Beddard Ltd v Patrick E Lung</i> ⁷⁴	29 June 1961	Dispute over schedule of decoration and repairs	Dy 1 4hrs. 45mins. Dy 2 4hrs. 13mins. Dy 3 4hrs. 50mins. Dy 4 35mins. Total: 14hrs. 23mins.
<i>Biu Estates Limited v Henry Bingham Towner</i> ⁷⁵	17 July 1961	Building claim – value of work; delay; defective	Dy 1 4hrs. 35mins. Dy 2 3hrs. 30mins.

⁶⁷ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.176 [Oct 2006 Series; HPIM 2052jpg]

⁶⁸ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.182 [Oct 2006 Series; HPIM 2055jpg]

⁶⁹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.185 [Oct 2006 Series; HPIM 2057jpg]

⁷⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.187 [Oct 2006 Series; HPIM 2058jpg]

⁷¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.188 [Oct 2006 Series; HPIM 2058jpg]

⁷² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.189 [Oct 2006 Series; HPIM 2059jpg]

⁷³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.192 [Oct 2006 Series; HPIM 2060jpg]

⁷⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.195 [Oct 2006 Series; HPIM 2062jpg]

⁷⁵ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.198 [Oct 2006 Series; HPIM 2063jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
		work;breach of building by-laws <i>J 114/41. Sir Walker Carter Notebook 1959-1963 p. 71.</i> [Dec 2006 Series. CIMG 0627]	Dy 3 4hrs. 40mins. Dy 4 3hrs. 25mins. Dy 5 4hrs. 25mins. Dy 6 4hrs. 45mins. Dy 7 3hr.ds 40mins. Dy 8 3hrs. 45mins. Dy 9 4hrs. 30mins. Dy 10 3hrs. 37mins. Dy 11 4hrs. 15mins. Dy 12 3hrs. 42mins. Total: 48hrs. 49mins.
<i>G Dew & Co Ltd v William Eves & Co Ltd</i> ⁷⁶	3 October 1961	Building claim <i>J 114/43 Sir Walker Carter's Notebook 1961 p.1</i> [Dec 2006 Series; SH 102005]	Dy 1 4hrs. 50mins. Dy 2 4hrs. 55mins. Dy 3 4hrs. 40mins. Dy 4 35mins. Total: 15hrs.
<i>Sergios Pafar Michael v A K Koritsas</i> ⁷⁷	11 October 1961	Building claim	Dy 1 5mins. Total: 5 mins.
<i>Caidwen Ann Taylor v Mary Alicia Clement</i> ⁷⁸	7 November 1961	Landlord and Tenant possession case <i>J 114/43 Sir Walker Carter's Notebook 1961 p.8</i> [Dec 2006 Series;SH 102007]	Dy 1 5hrs. 27mins. Dy 2 10mins. Total: 5hrs. 37mins.
<i>Rowland Stone v Henry Coen (Brighton)</i> ⁷⁹	13 November 1961	Building claim – defects <i>J 114/43 Sir Walker Carter's Notebook 1961 p.16</i> [Dec 2006 Series;SH 102009]	Dy 1 4hrs. 49mins. Dy 2 4hrs. Dy 3 4hrs. 15mins. Dy 4 2hrs. 55mins. Dy 5 5hrs. 52mins. Total: 21hrs. 51mins.
<i>Parkwood Engineering Co Ltd v Carlington Engineering Ltd</i> ⁸⁰	26 November 1961	Building claim Judgment on Preliminary Issue that there was no fixed price agreed.	Dy 1 4hrs. 20mins. Dy 2 2hrs. 15mins. Total: 6hrs. 35mins.
<i>Chalk v Vena Brothers (Cornwall)l Limited</i> ⁸¹	22 November 1961	Other. Judgement by consent	Dy 1 3hrs. 42mins. Dy 2 3mins

⁷⁶ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.205 [Oct 2006 Series; HPIM 2067jpg]

⁷⁷ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.207 [Oct 2006 Series; HPIM 2068jpg]

⁷⁸ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.208 [Oct 2006 Series; HPIM 2068jpg]

⁷⁹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.210 [Oct 2006 Series; HPIM 2069jpg]

⁸⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.216 [Oct 2006 Series; HPIM 2072jpg]

⁸¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.219 [Oct 2006 Series; HPIM 2074jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
			Total: 3hrs. 45mins.
<i>BIU Estates Ltd v Towner</i> ⁸² [part heard 13 th day]	27 November 1961	Building case J 114/41. Sir Walker Carter p.128. [CIMG 0629] Judgment given Day 17 12 th January 1962	Dy 13 3hrs. 20mins. Dy 14 4hrs. 28mins. Dy 15 4hrs. 25mins. Dy 16 50mins. Total: 13hrs. 33mins.
<i>Berroy v Acton</i> ⁸³	6 December 1961	Building claim	Dy 1 4hrs. 29mins. Dy 2 3hrs. 52mins. Dy 3 4hrs. 35mins. Dy 4 4hrs. 23mins. Dy 5 4mins. Dy 6 4hrs. 20mins. Dy 7 4hrs. 25mins. Dy 8 4hrs. 30mins. Dy 9 4hrs. 3mins. Dy 10 3hrs. 41mins. Total: 38hrs. 20mins.
<i>Benroy v Acton</i> ⁸⁴	20 December 1961 Hearing of adjourned action.	Building claim	Dy 11 4hrs. 10mins. Dy 12 1hr. 35mins. Dy 13 1hr. 14mins. Total: 6hrs. 57mins.
<i>R Butcher & Son v Fay</i> ⁸⁵	8 December 1961	Building claim	Dy 1 8mins. Total: 8 mins.
<i>Wheatleys (Newhaven) Limited v Smith</i> ⁸⁶	19 December 1961	Application for cross examination of witnesses	Dy 1 5mins. Total: 5mins.
<i>R Corben & Son Ltd v Forte (Olympics)</i> ⁸⁷	15 January 1962	Building case Appt of Court Expert	Dy 1 4hrs. 11mins. Dy 2: 4hrs 20mins Total: 8hrs. 31mins.
<i>S L Dando Ltd v Margaret</i> ⁸⁸	31 January 1962	Building dispute, matter of rights and title to boundary and sale of gantry	Dy 1 15mins. Total: 15mins.
<i>Leon v Beales</i> ⁸⁹	7 February 1962	Building claim Parties agreed appt of	Dy 1 4hrs. 16mins. Dy 2 5mins.

⁸² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.220 [Oct 2006 Series; HPIM 2074.jpg]

⁸³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.225 [Oct 2006 Series; HPIM 2077.jpg]

⁸⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.236 [Oct 2006 Series; HPIM 2082.jpg]

⁸⁵ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.232 [Oct 2006 Series; HPIM 2080.jpg]

⁸⁶ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.233 [Oct 2006 Series; HPIM 2081.jpg]

⁸⁷ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.239 [Oct 2006 Series; HPIM 2087.jpg]

⁸⁸ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.243 [Oct 2006 Series; HPIM 2089.jpg]

⁸⁹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.245 [Oct 2006 Series; HPIM 2090.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
		expert to supervise the remedial works	Total: 4hrs. 21mins.
<i>Radford v Wright Stephens Lloyd</i> ⁹⁰	19 February 1962	Building claim	Dy 1 3hrs. 58mins. Dy 2 4hrs. 6mins. Dy 3 4hrs. 18mins. Dy 4 4hrs. 28mins. Dy 5. 4hrs. 15mins Dy 6: 31mins Total: 21hrs. 36mins.
<i>Berger Jensen Nicholson Ltd v Ministry of Works</i> ⁹¹	5 March 1962 7 March 1962	Landlord and Tenant – dilapidations dispute View of property Failure to repair and maintain Judgment for Plf for £10,000 with costs.	Dy 1 4hrs. 5mins. Dy 2 4hrs. 6mins. Dy 3 5hrs. 15mins. Dy 4 4hrs. 7mins. Dy 5 4hrs. 49mins. Dy 6 2hrs. 17mins Dy 7 30mins Total: 25hrs. 9mins.
<i>R E Beale Ltd v Harding & Anor</i> ⁹²	19 March 1962	Building claim	Dy 1 5mins. Total: 5mins.
<i>A Merchant & Co Ltd v Gordon S Merchant</i> ⁹³	2 March 1962	Building claim	Dy 1 4hrs. 3mins. Dy 2 1hr. 5mins. Total: 5hrs. 8mins.
<i>Roberts v Wild</i> ⁹⁴ Trial held in Conway, Wales	27 March 1962	Building claim J 114/41. Sir Walker Carter p.149. [CIMG 0633]	Dy 1 4hrs. 8mins. Dy 2 4hrs. Total: 8hrs. 8mins.
<i>LV Purchasing & Co Ltd v Jacob Bros (a Firm)</i> ⁹⁵	4 April 1962	Building claim in respect of deflection of Terrazzo flooring “as to what it ought to have been and what it is”	Dy 1 2hrs. 9mins. Total: 2hrs. 9mins
<i>Stringer v Broadbridge (Shops) Limited [held at Runcorn]</i> ⁹⁶	28th May 1962	Building claim – bad workmanship. J 114/41. Sir Walker Carter p.163. [CIMG 0634]	Dy 1 3hrs. 34mins. Total: 3hrs. 34mins.

⁹⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.247 [Oct 2006 Series; HPIM 2091.jpg]

⁹¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.251 [Oct 2006 Series; HPIM 2093.jpg] (Judges Notebook J114/34 at p. 174 Sir Walker Carter indicates trial continued for 6th day SH101358-62)

⁹² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.259 [Oct 2006 Series; HPIM 2097.jpg]

⁹³ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.260 [Oct 2006 Series; HPIM 2097.jpg]

⁹⁴ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.263 [Oct 2006 Series; HPIM 2099.jpg]

⁹⁵ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.266 [Oct 2006 Series; HPIM 2100.jpg]

⁹⁶ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.275 [Oct 2006 Series; HPIM 2109.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Wrathall v Conlon & Anor (held at Preston)</i> ⁹⁷	20 June 1962	Building claim; quality of red burned shale for roadway. Claims withdrawn after submissions to referee. J 114/41. Sir Walker Carter p.170. [CIMG 0635]	Dy 1 1hr. 48mins. Total: 1hr. 48mins.
<i>Townsend's (Builders) Ltd v France</i> ⁹⁸	25 June 1962 26 June 1962: site visit	Building case: defective floor. J 114/41. Sir Walker Carter p.177. [CIMG 0638]	Dy 1 4hrs. 23mins. Dy 2 10mins (View) Dy 2 1hr 36mins Total: 6hrs 9mins
<i>Shearing v Wisehill Field Company Ltd</i> ⁹⁹	27 June 1962	Building case – preliminary issue J 114/41. Sir Walker Carter p.182. [CIMG 0639]	Dy 1 4hrs. 38mins. Dy 2 38mins. Dy 3 2hrs. 48mins. Total: 7hrs. 56mins.
<i>A.T. Chown & Co Ltd v Peter Davis Investments Limited</i> ¹⁰⁰	5 July 1962	Building claim – terms of settlement agreed. J 114/41. Sir Walker Carter p.192. [CIMG 0642]	Dy 1 1hr. 14mins. Total: 1hr. 14mins.
<i>Andrew (t/a Andrew & Co a firm) v Thomas (t/a Poopally Coir Mills)</i> ¹⁰¹	20 July 1962	Matter of account. J 114/41. Sir Walker Carter p.177. [CIMG 0643]	Dy 1 5mins. Total: 5mins.
<i>Welbeck Construction Co Ltd v Tower Construction Co Ltd and Welbeck Construction Co Ltd v Tower Construction Co Ltd (consolidated 23 October 1962)</i> ¹⁰²	5 November 1962	Building claim	Dy 1 3hrs. 18mins. Dy 2 7mins. Total: 3hrs. 25mins.

⁹⁷ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.278 [Oct 2006 Series; HPIM 2110jpg]

⁹⁸ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.279 [Oct 2006 Series; HPIM 2111jpg]

⁹⁹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.283 [Oct 2006 Series; HPIM 2113jpg]

¹⁰⁰ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.290 [Oct 2006 Series; HPIM 2116jpg]

¹⁰¹ Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.291 [Oct 2006 Series; HPIM 2118jpg]

¹⁰² Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.294 [Oct 2006 Series; HPIM 2119jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Barrow Brothers (Builders Lancaster) Limited v Haworth [Lancaster District Registry]</i> ¹⁰³	8 December 1962	Building claim	Dy 1 15mins. Total: 15mins.

TABLE 6

**Official Referee's Court 11. Minute Book No. 5¹⁰⁴. Sir Walker Kelly-Carter Q.C.
[1962-1965]**

Case Name	Date	Type of Case	Time occupied by the Referee
<i>United Retaining Service Ltd v T.G. Powell & Sons Ltd</i> ¹⁰⁵ .	17 th December 1962	Action withdrawn on defendants paying £414 to plfs. No Order as to costs	Dy 1 10mins. Total: 10mins.
<i>Waddell & Others v Mauroux</i> ¹⁰⁶	18 December 1962	Action on Bank Guarentee	Dy 1: 4hrs 33mins Dy 2: 10mins Total: 4hrs 43mins
<i>The Shopfitting Centre Ltd (The Proprietors of the Shopfitting Centre)v Revuelta</i> ¹⁰⁷	20 th December 1962	Building Claim	Dy 1: 1hr 28mins . Total: 1hr 28mins.

¹⁰³ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.296* [Oct 2006 Series; HPIM 2120jpg]

¹⁰⁴ *NatArch J116/2 17th December 1962 to 31st March 1965*

¹⁰⁵ *Nat.Arch J116/2 Official Referee's Court 11 Minute Book No. 5 p.1* [Dec 2006 Series;SH101773jpg]

¹⁰⁶ *Nat.Arch J116/2 Official Referee's Court 11 Minute Book No.5 p5* [Dec 2006 Series; SH101773-4jpg]

¹⁰⁷ *Nat.Arch J116/2 Official Referee's Court 11 Minute Book No. 5 p.5* [Dec 2006 Series;SH101775jpg]

TABLE 7

Cases not recorded in Minute Book Analysis J.114/41 Official Referee's Notebook Sir Walker Kelly-Carter Q.C. (1959-63)

There are three cases from 27th July 1962 to 30th December 1962 not noted in Minute Book Nos.4.or 5. These are:

Schedule C5.6D.

<i>George Harry Darvell and Jesse Wright Darvell together trading as G Darvell & Sons (a firm) v Jane Clift (Married Woman)</i> ¹⁰⁸	27 th July 1962	Debt action pronouncement of judgment	Dy 1: 10mins est.
<i>Wellbeck Construction Co Ltd v Tower Construction Co Ltd</i> ¹⁰⁹	5 th November 1962	Building Claim: Fixed price RIBA contract : dispute as to price on omission of certain works.	Dy 1 not recorded Dy 2 10mins est.
<i>Barron Bros (Builders Lancaster) Ltd v Haworth</i> ¹¹⁰	13 th December 1962	Building Claim: Entry of judgment	Dy 1

¹⁰⁸ *Nat.Arch J114/41 Official Referee's Notebook Sir Walker Carter Q.C. 1959-1963 p.195* [Dec 2006 Series; CIMG 0644jpg]

¹⁰⁹ *Nat.Arch J114/41 Official Referee's Notebook Sir Walker Carter Q.C. 1959-1963 p.197* [Dec 2006 Series; CIMG 0645jpg]

¹¹⁰ *Nat.Arch J114/41 Official Referee's Notebook Sir Walker Carter Q.C. 1959-1963 p.202* [Dec 2006 Series; CIMG 0646jpg]

TABLE 8

J.114.44 Official Referee's Notebook Sir Walker Kelly-Carter Q.C. (1962-65)

<i>A. Merchant & Co Ltd</i> <i>vMerchant</i> ¹¹¹	22 nd March 1962	Commercial Claim regarding Manufacturers Agreement	Dy 1
--	-----------------------------	---	------

¹¹¹ *Nat.Arch J114/41 Official Referee's Notebook Sir Walker Carter Q.C. 1962-1965 p.1* [Dec 2006 Series; CIMG 0668jpg]

TABLE 9

Data Collection: Minute Book Analysis as an efficiency demonstration. (January –March 1965) Official Referee’s Court 11 (1962-65) Minute Book No. 5.¹¹² Sir Walker Kelly-Carter Q.C.

Case Name	Date	Type of Case	Time occupied by the Referee
<i>H.C.Janes Limited and Longhurst Bros. Beale Ltd and Foster Yates Thom Ltd (Third Party) and W. Neil & Co Ltd (Fourth Party).</i> 113	12 th January 1965	Building claim [J114/45 Official Referee’s Notebook Sir Walker Kelly Carter Q.C. 1963-1966 Dec 2006 CIMG 0730] Ord. plfs costs to be taxed.	Dy 1: 10mins. Total: 10mins.
<i>Lorenzo Esposito vH.V Tulley</i> ¹¹⁴	17 th February 1965	Surveyor’s Negligence [J114/45 p. 249 Dec 2006 CIMG 0730]	Dy 1: 4hrs Dy 2: 3hrs 10mins Total: 7hrs 10mins
<i>Amberglass Reinforced Mouldings v Alexander Wright & Co (Westminster) Ltd</i> ¹¹⁵	3 rd March 1965	Building claim for materials.[J114/45 p.205 Dec 2006 CIMG 0732] Judg. for Def on claim and c/c for £6021.18.11 with costs.	Dy 1: 25mins . Total: 25mins.
<i>Acrow (Engineers)Ltd v Frank Berry & Son Ltd</i> ¹¹⁶ .	24 th March 1965	Engineering claim	Dy 1: 5 mins. Total 5mins.
<i>Extol Engineering Ltd v .The British Process Mounting Co (a firm) and</i>	29 th March 1965	Manufacture of engineering parts not conforming to prototype. Preliminary	Dy 1: 4hrs 30mins Dy 2: 4hrs 35mins Dy 3: 1hr 45mins Total: 10hrs. 45mins.

¹¹² NatArch J116/2 17th December 1962 to 31st March 1965

¹¹³ Nat.ArCh J116/2 Official Referee’s Court 11 Minute Book No. 5 p.265 [Dec 2006 Series;SH101776jpg]

¹¹⁴ Nat.ArCh J116/2 Official Referee’s Court 11 Minute Book No. 5 p.269 [Dec 2006 Series;SH101777jpg]

¹¹⁵ Nat.ArCh J116/2 Official Referee’s Court 11 Minute Book No. 5 p.277 [Dec 2006 Series;SH101781jpg]

¹¹⁶ Nat.ArCh J116/2 Official Referee’s Court 11 Minute Book No. 5 p.281 [Dec 2006 Series;SH101783jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Andrews Houseware Manufacturers Ltd</i> ¹¹⁷		Issues: what was contract? Did items correspond with sample? Were they fit for purpose? Are they entitled to refuse to take delivery of balance? [J114/45 p. 210 Dec 2006 CIMG 0736]	

¹¹⁷ *Nat.Arch J116/2 Official Referee's Court 11 Minute Book No. 5 p.283. [Dec 2006 Series;SH101784jpg]*

TABLE 10

**Sir Walker Carter Q.C. Minute Book for Official Referees' Court "C" Room 305,
Victory House, Kingsway, London WC1¹¹⁸**

From: 25th March 1965 to 20th October 1967

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Frederick William Young v Charles William Connery</i> ¹¹⁹	25 th March 1965	Building case – trial of preliminary issues What was the contract What was a reasonable price for extra works J.114/47 Sir Bret Cloutman for Sir Walker Carter. Notebook p.3 [Dec 2006 Series: SH101975]	Dy 1 4hrs. 30mins. Dy 2 3hrs. 5mins. Total: 7hrs. 35mins.
<i>Flexaire Limited v Victoria Property and Investment Co Ltd</i> ¹²⁰	1 April 1965	Sale of goods [J114/45 p. 223 Dec 2006 CIMG 0737]	Dy 1 4hrs. 30mins. Total: 4hrs. 30mins.
<i>Dependable Investment Limited & Anor v Cavendish & Son Ltd</i> ¹²¹	8 April 1965 [Adjourned from 29 June 1964. J.114/44 p.157 . CIMG0694]	Building case: claim for delay and extension of time. Assessment of damages	Dy 1 4hrs. 48mins. Total: 4hrs. 48mins.
<i>Middleton v Blackwell</i> ¹²²	16 June 1965	Misrepresentation and authority of agent. Preliminary Issue.	Dy 1 4hrs. Total: 4 hrs.
<i>Dontall Property Co Ltd v Ruben Pillay & Bernice Pillay</i> ¹²³	21 July 1965	Landlord and Tenant, breach of tenancy agreement delivery up in good repair [J 114/44 p.199 Dec 2006: CIMG 0697]	Dy 1 2hrs. 20mins. Total: 2hrs. 20 mins.
<i>Mory & Co Ltd v Regan Bros (Haulage) Limited</i> ¹²⁴	4 October 1965	Matter of account, negligence and detinue.	Dy 1 1hr. 45mins. Dy 2 2hrs. 45mins. ¹²⁵

¹¹⁸ Nat.Arch J116/3 Official Referee's Court "C" Minute Book [Oct 2006 Series: SH101012.jpg]

¹¹⁹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book [Oct 2006 Series: SH101015.jpg]

¹²⁰ Nat.Arch J116/3 Official Referee's Court "C" Minute Book [Oct 2006 Series: SH101016.jpg]

¹²¹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book [Oct 2006 Series: SH101018/20.jpg]

¹²² Nat.Arch J116/3 Official Referee's Court "C" Minute Book [Oct 2006 Series: SH101021/22.jpg]

¹²³ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.19 [Oct 2006 Series: SH101024.jpg]

¹²⁴ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.25/26 [Oct 2006 Series: SH101026.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
		[J114/44 p.203. CIMG0698]	Total: 4hrs. 30mins.
<i>Sanders v Ange Investments Limited</i> ¹²⁶	8 October 1965	Architect's fees claim on a quantum merit. [J114/44 p. 207 Dec 2006 .CIMG 0700]	Dy 1. 30 mins
<i>Goldstein v Hills Structures – Foundations Limited</i> ¹²⁷	11 th October 1965	Claim for damages for structural cracking; demolition, intrusion of air space and sealing off building. [J114/44 p. 207 Dec 2006 CIMG 0701]	Dy 1 3hrs. 27mins. Dy 2 2hrs. Dy 3 3hrs. 45mins. Dy 4 4hrs. 30mins. Dy 5 4hrs. 2mins. Dy 6 1hr. 45mins. Total: 19hrs. 14mins.
<i>Liddiard Lubricants Ltd v Perivale Paint Products Ltd</i> ¹²⁸	8 November 1965	Sale of goods [J114/44 p. 247 Dec 2006 CIMG 0704] Judgment for Deft	Dy 1 10mins. Total: 10mins.
<i>W J Barrs Ltd v Thomas Foulkes</i> ¹²⁹	10 November 1965 11 th November 1965 site visit	Mechanical and Heating claim boiler inadequacy: adj for counsel & experts to agree calculations. [J114/44 p. 249 Dec 2006 CIMG 0705]	Dy 1 4hrs. 15mins. Dy 2 45mins. Dy 3 10mins. Total: 5hrs. 10mins.
<i>Redamor Property Co Limited v Morrison Rose & Partners (A Firm) and Courtney-Fairbairn Ltd</i> ¹³⁰	13 December 1965	Action on lease dilapidations J.114/47 Sir Bret Cloutman for Sir Walker Carter. Notebook p.49 [Dec 2006 Series: SH101978]	Dy 1 3hrs. 52mins. Dy 2 1hr. Total: 4hrs. 52mins.
<i>Cook v Perkins Ltd. Vacwell Engineering Co Ltd</i> ¹³¹	15 December 1965	Sale of goods, action on goods sold and delivered, action for balance price J.114/47 Sir Walker Carter.	Dy 1 4hrs. 15mins. Total: 4hrs. 15mins.

¹²⁵ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.51/52 [Oct 2006 Series: SH101039.jpg]

¹²⁶ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.27 [Oct 2006 Series: SH101027.jpg]

¹²⁷ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.29 [Oct 2006 Series: SH101028.jpg]

¹²⁸ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.47 [Oct 2006 Series: SH101037.jpg]

¹²⁹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.49 [Oct 2006 Series: SH101038.jpg]

¹³⁰ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.59 [Oct 2006 Series: SH101042.jpg]

¹³¹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.61/62 [Oct 2006 Series: SH101043.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
		Notebook p.57 [Dec 2006 Series: SH101980]	
<i>Eaton Berry Ltd v King & Anor</i> ¹³²	17 December 1965	Not known. Settlement order agreed at £429.12.5. Plf 50% of costs. J.114/47 Sir Walker Carter. Notebook p.69 [Dec 2006 Series: SH101983]	Dy 1 10mins. Total: 10mins.
<i>Harry Kanter v George Kershaw Ridley & George Barty-King (Trustees of the Second Duke of Westminster)</i> ¹³³	11 January 1966	Arbitration referral Cloutman acting as Arbitrator. Use of dwelling house as business premises. J.114/47 Sir Walker Carter. Notebook p.71 [Dec 2006 Series: SH101984]	Dy 1 1hr. 52mins. Total: 1hr. 52mins.
<i>Horsley & Anor v G E Wallis & Sons Ltd (1) C E Eglinton (2) WER Randall & Son (A Firm) (3)</i> ¹³⁴	12 January 1966	Building dispute. Wrong concrete mix, nail in hot water pipe; water ingress through concrete slab. Pfs damages £3,125.10. 0. J.114/47 Sir Walker Carter. Notebook p.77 [Dec 2006 Series: SH1019786]	Dy 1 2hrs. 50mins. Total: 2hrs. 50mins.
<i>K A Interiors Ltd v Four Star Construction Ltd</i> ¹³⁵	26 January 1966	Building claim J.114/47 Sir Walker Carter. Notebook p81 [Dec 2006 Series: SH101988]	Dy 1 3hrs. 35mins. Dy 2 4hrs. 5mins. Dy 3 5hrs. 5mins. Dy 4 5hrs. 15mins. Total: 18hrs.
<i>J Pheby Ltd v A Greenhalgh Rhodes & Partners Ltd</i> ¹³⁶	31 January 1966	Building claim [J114/44 p. 257 Dec 2006 CIMG 0707]	Dy 1 4hrs. 45mins. Total: 4hrs. 45mins.
<i>United Dominions Trust (Commercial) Ltd v</i>	8 February 1966	Commercial case: Preliminary issues: as to	Dy 1 4hrs. 15mins. Total: 4hrs. 15mins.

¹³² Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.65 [Oct 2006 Series: SH101045.jpg]

¹³³ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.67 [Oct 2006 Series: SH101046.jpg]

¹³⁴ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.79 [Oct 2006 Series: SH101047.jpg]

¹³⁵ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.81 [Oct 2006 Series: SH101048.jpg]

¹³⁶ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.91 [Oct 2006 Series: SH101053.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Thomas Gravell & Prized Steele Garage Ltd</i> ¹³⁷ <i>Sitting at Crown Court, Guildhall, Swansea</i>		whether instrument was a guarantee or an indemnity or an option. [J114/45 p. 233 Dec 2006 CIMG 0738]	
<i>Bullock v Patience</i> ¹³⁸	2 March 1966	Building claim – extra works. Judg. £375.2.1. J.114/47 Sir Walker Carter. Notebook p.117 [Dec 2006 Series: SH101991]	Dy 1 4hrs. 56mins. Total: 4hrs. 56mins.
<i>Davies & Anor v Halsey</i> ¹³⁹	9 March 1966	Building defects J.114/47 Sir Walker Carter. Notebook p.123 [Dec 2006 Series: SH101993]	Dy 1 3hrs. 44mins. Total: 3hrs. 44mins.
<i>Webbs Asphalt Roofing & Flooring Co Ltd v Roper & BRM Shopfronts (A Firm)</i> ¹⁴⁰	14 March 1966	Building claim. [J114/48 p.1 Dec. 2006 Series CIMG 0592] Defective asphalt roof.	Dy 1 4hrs. Dy 2 10mins. Total: 4hrs. 10mins.
<i>Newbold v George Davis (Haulage) Limited</i> ¹⁴¹	29 March 1966	Matter of an account [J114/48 p.11 Dec. 2006 Series CIMG 0594]	Dy 1 4hrs. 25mins. Dy 2 1hr. Time: 5hrs. 25mins.
<i>Holden v Johnson and Mills v Johnson by way of counterclaim</i> ¹⁴²	4 th April 1966	Unknown. Order by consent on settlement.	Dy 1 5mins. Total: 5mins.
<i>Alloy & Fireboard Co Ltd v Superstein (a firm)</i> ¹⁴³	11 May 1966	Building claim [J114/48 p.30 Dec. 2006 Series CIMG 0595]	Dy 1 4hrs. 35mins. Dy 2 4hrs. 20mins. Dy 3 5hrs. 55mins. Total: 14hrs. 10mins.
<i>Louis Obermenter v Rodwell London &</i>	17 May 1966	Architect's fees claim for remuneration based on	Dy 1 4hrs. 20mins. Dy 2 4hrs. 20mins. Dy 3 3hrs. 50mins.

¹³⁷ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.99 [Oct 2006 Series: SH101055.jpg]

¹³⁸ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.109 [Oct 2006 Series: SH101060.jpg]

¹³⁹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.113 [Oct 2006 Series: SH101062.jpg]

¹⁴⁰ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.125 [Oct 2006 Series: SH101067.jpg]

¹⁴¹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.127 [Oct 2006 Series: SH101068.jpg]

¹⁴² Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.131 [Oct 2006 Series: SH101070.jpg]

¹⁴³ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.133 [Oct 2006 Series: SH101071.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Provincial Properties Ltd</i> ¹⁴⁴		quantum meruit and RIBA scale fee. Where fee falls between stages 1 and 2 or between 2 and 3 the Plaintiff argued he was entitled to claim the lower stage plus <i>quantum meruit</i> for work after that stage. [J114/48 p.55 Dec. 2006 Series CIMG 0597 to CIMG 0606]	Dy 4. 4hrs. 30mins. Dy 5 3hrs. 55mins. Dy 6 4hrs. 20mins. Dy 7 4hrs. 25mins. Dy 8 3hrs. 50mins. Dy 9 3hrs. 45mins. Dy 10 4hrs. 50mins. Dy 11 4hrs. 15mins. Dy 12 4hrs. 15mins. Dy 13 4hrs. 30mins. Dy 14 4hrs. Dy 15 4hrs. 30mins. Dy 16 1hr. 30mins. Dy 17 1hr. 15mins. Dy 18 4hrs. 20mins. Dy 19 2hrs. 40mins. Total: 75hrs. 20mins.
<i>Harry Richardson & Partners Ltd v Rigley</i> ¹⁴⁵ (Nottingham District Registry)	7 June 1966	Building claim J.114/47 Sir Walker Carter. Notebook p.3 [Dec 2006 Series: SH101998]	Dy 1 4hrs. 20mins. Dy 2 10mins. Total: 4hrs. 30mins.
<i>Moresk Cleaners Ltd v Hicks</i> ¹⁴⁶	5 July 1966	Building claim: Architect's responsible for employing sub consultant/contractor to design steelwork. J.114/49 Sir Walker Carter. Notebook p. 1 [Dec 2006 Series: SH101941]	Dy 1 5hrs. 2mins. Dy 2 5hrs. 10mins. Total: 10hrs. 12mins.
<i>AJ Reffold Partners Ltd v Worthy Estates Ltd & England Down Limited (third party)</i> ¹⁴⁷	11 July 1966	Action for negligence and nuisance J.114/49 Sir Walker Carter. Notebook p. 21 [Dec 2006 Series: SH101944]	Dy 1 4hrs. 25mins. Dy 2 2hrs. 55mins. Total: 7hrs. 20mins.

¹⁴⁴ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.139 [Oct 2006 Series: SH101074.jpg]

¹⁴⁵ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.161 [Oct 2006 Series: SH101080.jpg]

¹⁴⁶ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.163 [Oct 2006 Series: SH101081.jpg]

¹⁴⁷ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.167 [Oct 2006 Series: SH101083.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<i>Vincent Murphy & Co Ltd v Southeastern Joinery Works (1950) Ltd</i> ¹⁴⁸	26 July 1966	Building claim J.114/49 Sir Bret Cloutman for Sir Walker Carter. Notebook p. 37 [Dec 2006 Series: SH101948]	Dy 1 25mins. Total: 25mins.
<i>K.Cross (Doncaster) Ltd v County Council of York (East Riding)</i> ¹⁴⁹	10 October 1966	Building claim on preliminary issues as to Architect's duty and P.C. sums. J.114/49 Sir Walker Carter. Notebook p. 39 [Dec 2006 Series: SH101949]	Dy 1 4hrs. 25mins. Dy 2 4hrs. Dy 3 55mins. Total: 9hrs. 20mins.
<i>Wright Bros (Wolverhampton) Ltd v E.A.Barlow & Sons (Transport) Ltd</i> ¹⁵⁰	17 th October 1966	Building claim – rectification of contract J.114/49 Sir Walker Carter. Notebook p.5 1 [Dec 2006 Series: SH101951]	Dy 1 4hrs. 25mins. Dy 2 4hrs. 30mins. Dy 3 3hrs. 40mins. Dy 4 15mins. Total: 12hrs. 50mins.
<i>Bailey v Purver</i> ¹⁵¹	24 October 1966	Building claim J.114/49 Sir Walker Carter. Notebook p. 79 [Dec 2006 Series: SH101955]	Dy 1 4hrs. 45mins. Dy 2 4hrs. 40mins. Dy 3 3hrs. 45mins. Dy 4 2hrs. 17mins. Dy 5 55mins. Total: 19hrs. 22mins.
<i>Leighton v Tait & Alt</i> ¹⁵²	31 October 1966	Building claim: defects to roof and rising damp. Judgt £1,850 to Pltf. J.114/49 Sir Walker Carter. Notebook p. 121 [Dec 2006 Series: SH101957]	Dy 1 2hrs. 35mins. Total: 2hrs. 35mins.
<i>Bickley v Dawson</i> ¹⁵³	7 November 1966	Building claim – settled by discussion with Counsel No entry of this in Judges notes. J.114/49 Sir Walker Carter. Notebook p. 131 [Dec 2006 Series: SH101961]	Dy 1 10mins. Total: 10mins.

¹⁴⁸ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.171 [Oct 2006 Series: SH101085.jpg]

¹⁴⁹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.172 [Oct 2006 Series: SH101085.jpg]

¹⁵⁰ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.177 [Oct 2006 Series: SH101087.jpg]

¹⁵¹ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.180 [Oct 2006 Series: SH101088.jpg]

¹⁵² Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.189 [Oct 2006 Series: SH101091.jpg]

¹⁵³ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.191 [Oct 2006 Series: SH101092.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
<p><i>Ancor Colour Print Laboratories Ltd v J Burley & Sons Ltd and F & D Hewitt Limited (third parties)</i>¹⁵⁴</p>	<p>20 October 1967</p>	<p>Building claim J Building claim: defects to roof and rising damp. Judgt £1,850 to Pltf. J.114/49 Sir Walker Carter. Notebook p. 135 [Dec 2006 Series: SH101962] [J114/52 pp.1-83 Dec 2006 CIMG 0751-0756] Day 31 to Day 46. Judgt for Plaintiff:£25,454. Discovery lengthened case; adj for 4 weeks. No costs awarded for this.</p>	<p>Dy 1 4hrs. 25mins. Dy 2 4hrs. 10mins. Dy 3 4hrs. Dy 4 40mins. Dy 5 2hrs. 15mins. Dy 6 25mins. Dy 7 4hrs. Dy 8 4hrs. 30mins. Dy 9 3hrs. 30mins. Dy 10 4hrs. 20mins. Dy 11 4hrs. 25mins. Dy 12. 4hrs. 20mins. Dy 13 4hrs. 35mins. Dy 14 4hrs. 25mins. Dy 15 4hrs. 25mins. Dy 16 4hrs. 25mins. Dy 17 4hrs. 5mins. Dy 18 4hrs. Dy 19 4hrs. 15mins. Dy 20 3hrs. 50mins. Dy 21 3hrs. 50mins. Dy 22 4hrs. 25mins. Dy 23 4hrs. 15mins. Dy 24 4hrs. 30mins. Dy 25 4hrs. 20mins. Dy 26 4hrs. 25mins. Dy 27 4hrs. 15mins. Dy 28 3hrs. 40mins. Dy 29 4hrs. 30mins. Dy 30 4hrs. 50mins. Dy 31 4hrs. 20mins. Dy 32 4hrs. 55mins. Dy 33 4hrs. 20mins. Dy 34 4hrs. 10mins. Dy 35 2hrs. 10mins. Dy 36 1hr. 10mins. Dy 37 4hrs. Dy 38 4hrs. 20mins. Dy 39 5hrs. Dy 40 4hrs. 45mins.</p>

¹⁵⁴ Nat.Arch J116/3 Official Referee's Court "C" Minute Book p.193 [Oct 2006 Series: SH101093.jpg]

Case Name	Date	Type of Case	Time occupied by the Referee
			Dy 41 5hrs. Dy 42 4hrs. 15mins. Dy 43 4hrs. 25mins. Dy 44 3hrs. 10mins. Dy 45 20mins. Total: 174hrs. 20mins

TABLE 11

Sir Walker Carter Q.C. Official Referees' Court, Court 'C' Minute Book No. 7

From: 11th January 1967-27th October 1967.¹⁵⁵

<i>Universal Metal Furrine vGeorge Willment Ltd</i> ¹⁵⁶	11 th January 1967	Building claim-settlement Agreed. Judg for Plf £1350 plus costs. C/c dismissed with costs. J.114/53 <i>Sir Walker Carter's Notebook</i> p.1 [Dec 2006 Series: SH102031]	Dy 1 5mins. Total: 5 mins
<i>Ray Wayland & Co Ltdv Taylor</i> ¹⁵⁷	19 th January 1967	Building claim defective Work and breach of building regs. J.114/53 <i>Sir Walker Carter's Notebook</i> p.3 [Dec 2006 Series: SH102032]	Dy 1 5hrs. 10mins. Dy 2 3hrs. 45mins. Total: 8hrs. 55mins
<i>Antcliffe vAlfred Bannister (Trawlers) Ltd and Barrett v Taylor Steam Fishing Co Ltd</i> ¹⁵⁸ <i>Ancliffe vAlfred Bannister (Trawlesr) Ltd</i> [heard separately]	24 th January 1967	Personal injury to member of trawler crew caused by lack instruction/ experience of crew member J.114/53 <i>Sir Walker Carter's Notebook</i> p.17 [Dec 2006 Series: SH102034]	Dy 1 4hrs. 35mins. Dy 2 4hrs. 30mins. Total: 9hrs. 5mins Dy 1: 2hrs 50mins Dy 2: 3hrs 25mins Dy 3: 2hrs 47mins Total: 9hrs.2mins
<i>Brownland Estates Ltd v Taylor</i> ¹⁵⁹	31 st January 1967	Forfeiture of tenancy Site visit after which claim amended and case settled. J.114/53 <i>Sir Walker Carter's Notebook</i> p.75 [Dec 2006 Series: SH102041]	Dy 1 2hrs. 10mins. Total: 2hrs. 10mins
<i>Olga Hilditch (Widow) v Charles E.H. Durham and A E L Durham (Married Woman)</i> ¹⁶⁰	24 th February 1967	Preliminary Issue: extent of landlord's liability to repair. Payment out ordered of £300 to Plf.J.114/53 <i>Sir Walker Carter's Notebook</i> p.81 [Dec 2006 Series: SH102043]	Dy 1 10mins. Total: 10mins

¹⁵⁵ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7* [Dec 2006 Series;SH101791-SH 101931]

¹⁵⁶ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7* p. 1 [Dec 2006 Series;SH101803]

¹⁵⁷ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7* p.3 [Dec 2006 Series;SH101804]

¹⁵⁸ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7* p.7 [Dec 2006 Series;SH101806]

¹⁵⁹ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7* p.17[Dec 2006 Series;SH101809]

¹⁶⁰ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7* p.19[Dec 2006 Series;SH101810]

<i>Trafalgar Shoplifting Co Ltd v S Cooper (Male)</i> ¹⁶¹	27 th February 1967	Building Claim J.114/53 <i>Sir Walker Carter's Notebook</i> p.83 [Dec 2006 Series: SH102044]	Dy 1 4hrs. Dy 2 4hrs. 15mins. Dy 3 5hrs. 40mins. Dy 4 5hrs 5mins. Total: 19hrs.
<i>Industrial Vac Air Ltd v Armstrong</i> ¹⁶²	17 th April 1967	Breach of contract: accord and satisfaction and <i>quantum meruit</i> J.114/53 <i>Sir Walker Carter's Notebook</i> p.119 [Dec 2006 Series: SH102047]	Dy 1 5hrs. 5mins. Dy 2 4hrs. 20mins. Total: 9hrs. 25mins
<i>Eaves v Bayswater Country Properties Ltd and Langdon</i> ¹⁶³	20 th April 1967	Building claim. Payment out of £300. No costs. J.114/53 <i>Sir Walker Carter's Notebook</i> p.137 [Dec 2006 Series: SH102049]	Dy 1 2hrs. Total: 2hrs.
<i>Swallow Prams Limited v United Air Coil Limited</i> ¹⁶⁴	11 th May 1967	Dilapidations claim: Preliminary issue as to waiver Judg for Defdts. Pltf to pay 2/3 Defdt's costs. J.114/53 <i>Sir Walker Carter's Notebook</i> p.149 [Dec 2006 Series: SH102052]	Dy 1 3hrs. 55mins. Total: 3hrs. 55mins
<i>Portmadoc Building Co Ltd v E Timmins & Sons Ltd</i> ¹⁶⁵ Sitting at County Hall Chester.	26 th September 1967	Claim for damages for subsidence. Problems of pill with artesian base being eroded. J.114/53 <i>Sir Walker Carter's Notebook</i> p.161 [Dec 2006 Series: SH102055]	Dy 1 6hrs. Dy 2 5hrs. 45mins. Dy 3 6hrs. 30mins. Dy 4 3hrs 5mins. Dy 5 6hrs. Dy 6 5hrs. 55ins. Dy 7 3hrs Total: 36hrs. 10mins
<i>Webb v Loyal Steam Fishing Co Ltd</i> ¹⁶⁶ Town Hall Grimsby	30 th October 1967	Negligent operation of trawler which trawled duff instead of fish off Lofoten Islands in Norway result in accident. J.114/54 <i>Sir Walker Carter's Notebook</i> p.1 [Dec 2006 Series: SH102066]	Dy 1 5hrs. 35mins. Dy 2 1hrs. 55mins. Total: 7hrs. 30mins
<i>Helland v St Andrews Steam Fishing Co Ltd</i> ¹⁶⁷	4 th October 1967	Skipper failed to take reasonable care: tackle wire long; dangerous operated in Force 5 wind and very conditions. Damages award:£5,500	Dy 1 3hrs. 51mins. Dy 2 5hrs. 35mins. Total: 9hrs. 26mins

¹⁶¹ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.21*[Dec 2006 Series;SH101811]

¹⁶² *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.27*[Dec 2006 Series;SH101814]

¹⁶³ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.31*[Dec 2006 Series;SH101816]

¹⁶⁴ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.35*[Dec 2006 Series;SH101818]

¹⁶⁵ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.37*[Dec 2006 Series;SH101819]

¹⁶⁶ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.51*[Dec 2006 Series;SH101823]

¹⁶⁷ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.56* [Dec 2006 Series;SH101825]

		J.114/54 Sir Walker Carter's Notebook p.17 [Dec 2006 Series: SH102069]	
<i>Hill and Smith v Flemin Brothers Ltd</i> ¹⁶⁸	9 th October 1967	Engineering claim: cost of galvanising steel Structure J.114/54 Sir Walker Carter's Notebook p.41 [Dec 2006 Series: SH102071]	Dy 1 3hrs. 30mins. Dy 2 2hrs. 50mins. Total: 6hrs. 20mins
<i>Parsons v Derryman</i> ¹⁶⁹	16 th October 1967 (adj 3 rd day of trial to Feb 1968)	Building Claim J.114/54 Sir Walker Carter's Notebook p.57 [Dec 2006 Series: SH102074] and also J.114/52 Sir Walker Carter. Notebook p. 91 [Dec 2006 Series: CIMG 0757]	Dy 1 4hrs. 15mins. Dy 2 4hrs. 30mins. Dy 3 3hrs. 40mins. Total: 12hrs. 25mins
<i>Holmes v Motor Vehicle Collection Ltd</i> ¹⁷⁰	27 th October 1967	Debt due J.114/52 Sir Walker Carter. Notebook p. 101 [Dec 2006 Series: CIMG 0758]	Dy 1 2hrs. Total: 2hrs.

¹⁶⁸ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.61 [Dec 2006 Series;SH101828]*

¹⁶⁹ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.65 [Dec 2006 Series;SH101830]*

¹⁷⁰ *Nat Arch J 116/4 Sir Walker Carter Official Referees' Court Minute Book No.7 p.81 [Dec 2006 Series;SH101834]*

TABLE 12

**Cases not recorded in Minute Book analysis.
J114/52 Sir Walker Kelly-Carter's Notebook (1967-68)**

<i>Parsons vDerryman</i> ¹⁷¹	17 th October 1967	Building claim	Dy 20. Time not entered
<i>Holmes v Motor Vehicle Collection Ltd</i> ¹⁷²	27 th October 1967	Haulage company dispute and accounts	Dy 1. Time not entered.

TABLE 13

J 114/51 Sir Walker Carter's Notebook 1967

<i>C.W. Ingham & Son Limited vMark Perks Limited</i> ¹⁷³	6 th February 1967	Defective boiler claim	Dys 1-3 time not entered
---	-------------------------------	------------------------	--------------------------

TABLE 14

J 114/50 Sir Bret Cloutman's Notebook 1966-68

<i>Vincent Murphy & Co Ltd v South Eastern Joinery Works (1950) Ltd</i> ¹⁷⁴	26 th July 1966	Claim as to price of building materials	Dy 1 Time not recorded
--	----------------------------	---	---------------------------

¹⁷¹ *Nat Arch J 114/52 Sir Walker Carter's Notebook* p.91 [Dec 2006 Series;CIMG 0757]

¹⁷² *Nat Arch J 114/52 Sir Walker Carter's Notebook* p.101 [Dec 2006 Series;CIMG 0758]

¹⁷³ *Nat Arch J 114/51 Sir Walker Carter's Notebook* 1967 p.1 [Dec 2006 Series;SH 102014]

¹⁷⁴ *Nat Arch J 114/52 Sir Bret Cloutman's Notebook* p.1 [Dec 2006 Series;SH. 102018]

TABLE 15

Walker Carter Period (1959-62) Settlement in the course of the trial

Title of Action	Time taken in court to reach settlement
<i>Martin French v Kingswood Hill Ltd</i> ¹⁷⁵ Judicial encouragement for settlement 6 th May 1959	5hrs. 45mins
<i>Midlands Electricity Board v Holder</i> ¹⁷⁶ After hearing 2 witnesses settlement achieved. 3 rd June 1959	2hrs.10mins
<i>Arnold Meyrick Limited v P E Thomas</i> ¹⁷⁷ 26 October 1959	3 mins.
<i>J.J. Sullivan (Piccadily) Limited v J. Conrad & S. Conrad</i> ¹⁷⁸ 28 th October 1959	4 mins.
<i>H. G. Dunford & Bros v E Sutton</i> ¹⁷⁹ 1 st December 1959	2hrs. 35mins
<i>M L Transport(a firm)v Horrocks</i> ¹⁸⁰ Judgment by consent. 11 th January 1960	50mins
<i>James Atkinson and Veronica Atkinson Alandale and Celia Dale v Steer</i> ¹⁸¹ Action withdrawn on basis defendant undertook not to execute judgment in another High Court action. 20 th January 1960	4hrs. 25mins.
<i>HG Thomas v Nichol</i> ¹⁸² 10 th Feb. 1960	10 mins

¹⁷⁵ Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* [Oct 2006 Series; HPIM 1964jpg] and J114/34 *Official Referee's Notebook; Sir Walker Carter, Q.C.* SH 101355jpg

¹⁷⁶ Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* p.96 [Oct 2006 Series; HPIM 1970jpg]

¹⁷⁷ Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* p. 63 [CIMG 0164]

¹⁷⁸ Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* p. 65 [CIMG 0165]

¹⁷⁹ Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* p85 [Oct 2006 Series; HPIM 2005jpg]

¹⁸⁰ Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* p.93 [Oct 2006 Series; HPIM 2009jpg]

¹⁸¹ Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* p.94 [Oct 2006 Series; HPIM 2009jpg]

¹⁸² Nat.Arch J116/1 *Official Referee's Court Minute Book No 4* p.98 [Oct 2006 Series; HPIM 2011jpg]

<i>Charles Amos Gander v D Hooper & Anor</i> ¹⁸³ 29 February 1960.	40 mins.
<i>James Kinross v R H Tarrant</i> ¹⁸⁴ 15 March 1960 Action compromised on terms after Referee adjourned case for 10 days to enable parties to consider position.	8hrs.
<i>T Projects Limited v William Reader</i> ¹⁸⁵ 29 March 1960	5mins.
<i>Livio Mascherpa v Direck Limited</i> ¹⁸⁶ 4 May 1960	27 mins.
<i>John Fletcher Suiter v W Pikta</i> ¹⁸⁷ 7 June 1961	5hrs. 13mins.
<i>R Corben & Son Ltd v Forte (Olympics)</i> ¹⁸⁸ 15 January 1962. Use of expert to resolve what was a reasonable price for building works.	8hrs. 31mins.
<i>S L Dando Ltd v Margaret</i> ¹⁸⁹ 31 January 1962 .	15mins
<i>R E Beale Ltd v Harding & Anor</i> ¹⁹⁰ 19 th March 1962 .	5mins.

¹⁸³ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.103* [Oct 2006 Series; HPIM 2014.jpg]

¹⁸⁴ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.107* [Oct 2006 Series; HPIM 2016.jpg]

¹⁸⁵ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.112* [Oct 2006 Series; HPIM 2018.jpg]

¹⁸⁶ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.116* [Oct 2006 Series; HPIM 2020.jpg]

¹⁸⁷ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.185* [Oct 2006 Series; HPIM 2057.jpg]

¹⁸⁸ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.239* [Oct 2006 Series; HPIM 2087.jpg]

¹⁸⁹ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.243* [Oct 2006 Series; HPIM 2089.jpg]

¹⁹⁰ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.259* [Oct 2006 Series; HPIM 2097.jpg]

<i>A.T. Chown & Co Ltd v Peter Davis Investments Limited</i> ¹⁹¹ 5 July 1962	1hr. 10mins.
<i>Barrow Brothers (Builders Lancaster) Limited v Haworth [Lancaster District Registry]</i> ¹⁹² 8 December 1962	15mins.

Average time= 2,443mins/18 cases =2hrs.16mins in getting to settlement before judgement.

¹⁹¹ *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.290* [Oct 2006 Series; HPIM 2116jpg]

¹⁹² *Nat.Arch J116/1 Official Referee's Court Minute Book No 4 p.296* [Oct 2006 Series; HPIM 2120jpg]

TABLE 16
Walker Carter Period (1965-67) Settlement in the course of the trial:

Title of Action	Time taken in court to reach settlement
<p><i>H.C.Janes Limited and Longhurst Bros. Beale Ltd and Foster Yates Thom Ltd (Third Party) and W. Neil & Co Ltd (Fourth Party).</i>¹⁹³ 12th January 1965.</p>	10mins.
<p><i>Acrow (Engineers)Ltd v Frank Berry & Son Ltd</i>¹⁹⁴. 24th March 1965 Settlement agreed on stay of proceedings. Judgement for £1,100 for Plf with costs. Stay of execution 30 days.</p>	5 mins.
<p><i>Redamor Property Co Limited v Morrison Rose & Partners (A Firm) and Courtney-Fairbairn Ltd</i>¹⁹⁵ 13 December 1965 Settlement agreed on stay of proceedings. Judgement for £400 for Plf with costs to be taxed</p>	4hrs. 52mins.
<p><i>Eaton Berry Ltd v King & Anor</i>¹⁹⁶ 17 December 1965 Settlement agreed consent to judgment for £429.12.5 and 50% of plaintiffs costs to be taxed if not agreed. £305 in court to be paid out to plaintiffs</p>	10 mins.
<p><i>Horsley & Anor v G E Wallis & Sons Ltd (1) C E Eglinton (2) WER Randall & Son (A Firm) (3)</i>¹⁹⁷ 12 January 1966 All proceedings stayed payment out to plaintiff's solicitors of £3,125 with Plfs costs to be taxed.</p>	2 hrs.50mins.
<p><i>Webbs Asphalt Roofing & Flooring Co Ltd v Roper & BRM Shopfronts (A Firm)</i>¹⁹⁸ 14 March 1966 Settlement after first day's hearing. No Order save stay on terms Legal Aid Taxation for 2nd and 3rd parties.</p>	4hrs 10mins
<p><i>Holden v Johnson and Mills v Johnson by way of counterclaim</i>¹⁹⁹</p>	5 mins.

¹⁹³ Nat.ArCh J116/2 *Official Referee's Court 11 Minute Book No. 5* p265 [Dec 2006 Series;SH101776jpg]

¹⁹⁴ Nat.ArCh J116/2 *Official Referee's Court 11 Minute Book No. 5* p.281 [Dec 2006 Series;SH101783jpg]

¹⁹⁵ *Nat.ArCh J116/3 Official Referee's Court "C" Minute Book p.59* [Oct 2006 Series: SH101042.jpg]

¹⁹⁶ *Nat.ArCh J116/3 Official Referee's Court "C" Minute Book p.65* [Oct 2006 Series: SH101045.jpg]

¹⁹⁷ *Nat.ArCh J116/3 Official Referee's Court "C" Minute Book p.79* [Oct 2006 Series: SH101047.jpg]

¹⁹⁸ *Nat.ArCh J116/3 Official Referee's Court "C" Minute Book p.125* [Oct 2006 Series: SH101067.jpg]

¹⁹⁹ *Nat.ArCh J116/3 Official Referee's Court "C" Minute Book p.131* [Oct 2006 Series: SH101070.jpg]

<p>4th April 1966 Settlement announced to court at 11 a.m. Judgement for Holden for £311 and for Mills £195. Stay of Execution 14 days</p>	
<p><i>Bickley v Dawson</i>²⁰⁰ 7th November 1966 Building claim – settled by discussions between Counsel. Case adjourned for 10 minutes and parties agreed Judgment for Plaintiff for £400</p>	10 mins.
<p><i>Universal Metal Furrine v George</i> <i>Willment Ltd</i>²⁰¹ 11th January 1967 Terms of settlement Agreed at 10.50 a.m.. Judg for Plf £1350 plus costs. C/c dismissed with costs</p>	5 mins.
<p><i>Brownland Estates Ltd v Taylor</i>²⁰² 31st January 1967 Forfeiture of tenancy Site visit after which claim amended and case settled after defendant gave evidence. Surrender tenancy £235. 15 paid out as to £61.5 to Plaintiff and £174.10 to the Defendant. Defendant to pay Plaintiff's costs to be taxed</p>	2hrs 10mins
<p><i>Olga Hilditch (Widow) v Charles</i> <i>E.H. Durham and A E L Durham</i> <i>(Married Woman)</i>²⁰³ 24th February 1967 Preliminary Issue: extent of landlord's Liability to repair. Payment out ordered of £300 to Plf.</p>	10mins.
<p><i>Eaves v Bayswater Country</i> <i>Properties Ltd and Langdon</i>²⁰⁴ 20th April 1967 Building claim. Parties came to terms after 2 hours of hearing Plaintiff's opening and evidence</p>	2hrs

Average time taken to settlement before judgement=1,017mins/12cases =1hr. 25mins.

²⁰⁰ Nat. Arch J116/3 *Official Referee's Court "C" Minute Book p.191* [Oct 2006 Series: SH101092.jpg]

²⁰¹ Nat Arch J 116/4 *Sir Walker Carter Official Referees' Court Minute Book No.7 p. 1* [Dec 2006 Series;SH101803] J.114/53 *Sir Walker Carter's Notebook p.1* [Dec 2006 Series: SH102031

²⁰² Nat Arch J 116/4 *Sir Walker Carter Official Referees' Court Minute Book No.7 p.17*[Dec 2006 Series;SH101809

²⁰³ Nat Arch J 116/4 *Sir Walker Carter Official Referees' Court Minute Book No.7 p.19*[Dec 2006 Series;SH101810]

²⁰⁴ Nat Arch J 116/4 *Sir Walker Carter Official Referees' Court Minute Book No.7 p.31*[Dec 2006 Series;SH101816]

JUDGES' NOTEBOOK ANALYSIS

**T. Eastham K.C. Notebooks J. 114/3-4 (1946-48) and
J. 114/21 (1951-55)**

Archive Reference	Digital Record Reference	Date	Name of case	Type	Caseflow management element
J.114/3	CIMG 0034	5/4/46	Harris v Rex Foods	Assessment of Damages	acted as jury
	CIMG 0036	27/5/46	Norton Griffiths Plant Hire Limited	Breach of warranty/damages	
J.114/3	CIMG 0037 CIMG 0039	11/11/46	S.J.C. Duqueim v Atlas Assurance Company Limited	Fire damage to furniture; concealment of material facts	Acted as arbitrator
J.114/3	CIMG 0041	9/12/46	W.J Gray & Sons v Royal Mail Lines Limited	Repairs to tug following collision	Use of experts in assessing damage
J.114/4	CIMG 0046	18/11/46	Fox v John Sherwood & Partners Ltd	Application for leave to amend particulars ²⁰⁵	
J.114/4	CIMG 0049	20/11/47	Zenith Skin Trading Company v Frankel	Partnership dispute	Referee acted as a jury in fixing the price ²⁰⁶
	CIMG 0056	1/6/48	Sydney Smith Black Coaches Limited v J.F. Anderson	Car repairs	
	CIMG 0060	3/11/48	Leonidas (Builders) Ltd v M. Saks	War Damage Act repairs to house	
J.114/21 23 cases noted in 1951-52 and 1955.	CIMG 0062	9/11/50	Hayland v Springet & Son	Settlement agreed	Facilitating settlement
J.114/21	CIMG 0063	24/1/52	James Conlon Trading v Lloyds Builders Ltd	Settlement agreed	Facilitating settlement
	CIMG 0067	25/1/52	Van Nuffelen v Leicester	Stay of execution	
	CIMG 0068	20/2/52	Richards v Bartle	Dispute over amount of commission payable on the sale of cows	
	CIMG 0070	20/3/52	La Planche v Newman	Order by consent	
	CIMG 0071	24/3/52	Super Clothing Co Ltd v John Betty	Damages awarded for badly made suits	

²⁰⁵ Eastham noted: ... where there was conflict of evidence I believed the plaintiff. He was a more reliable witness than Justice for the Defendants. *Nat. Arch J.114/4* p.90 [CIMG 0048]

²⁰⁶ Eastham noted: "I don't believe the defendant's explanations about the sales he alleges. The only real issue is the price to be fixed on 63 furs."

				which did not comply with sample	
	CIMG 0074	13/5/52	J.C. Robertson & Son v House	Whether underpinning carried out in accordance with design	
	CIMG 0075	23/11/52	Bedford Theatre London Limited v Brisford Entertainments Ltd	121 items of defective work disputed Judgement for £400 ²⁰⁷	
	CIMG 0077	17/12/53	Kefford v Brownleader	Settlement by consent order	

²⁰⁷ The “Scott Schedule” as it is commonly called was referred to here as “Scott’s” schedule.

JUDGE'S NOTEBOOK NO 55
Sir T. Eastham K.C.

File No. J114/15 – CIMG0447

May 1950 – December 1951

INDEX OF CASES

Eden v Berryman & Co	page 1
W H Armfield Ltd v John England	page 70
Dodsworth v Ross & Ross Tate & Co Ltd	page 91
Bevins v Stratton Securities Limited	page 107
Geometric Designs Limited v Shearmow Engineering Co Ltd	page 151
Socket v Freeman & Ors	page 179
Phillips & Co v Southern	page 255
Hartell v Services Car Hire	page 256

JUDGES NOTEBOOK NO 55

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/15	CIMG0448	01/05/50	Eden v Berryman & Co	Claim for damages for £109.19s.6p paid out of monies in Court. Costs reserved.	
J114/15	CIMG0449	22/06/50	W H Armfield Ltd v John England Perfumers Ltd	Application for amendment to pleadings, Judge refused to amend and decided to deal with preliminary issues namely questions as to whether there was an award by an arbitrator or not and whether arbitrator had authority to act as arbitrator.	Whether there was an agreement to submit to arbitration and if there was an agreement to arbitration was there a valid arbitration bearing in mind the Defendants were never heard by the arbitrator? No meeting of the parties. Arbitrator says he was asked to value the work which had not been carried out, judge found there was no submission to arbitration, no award was made. Judgement for Plaintiffs on preliminary issue in the sum of £658.18s.1p Plaintiffs entitled to take all the money out of Court. Defendants undertaking to pay £300 and costs into Court within 7 days.
J114/15	CIMG0466	22/11/50	Jack Hyman Sockel v Issacc Francis Salmon Matthew Francis	Dispute as to fixed lump sum prior to building contract	Preliminary issues what was the contract in May 1948 about the area outside the garage? What was the contract in June

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
					1948 in respect of the garage floor? Judgment for Plaintiff for £202.10s with costs to be taxed. Judgment for Defendant on counterclaim for £45.3s.3p costs to be taxed. If Judge says he was wrong then costs for not taking up floor were £75.
J114/15	CIMG0477	08/12/50	Phillips v Southern	Claim for damages. Judgment by consent as agreed between parties in correspondence. For Plaintiff in sum of £195.3s with costs of £105.	

JUDGES NOTENOTEBOOK NO 57

INDEX

J114/16

Date	Case	Page No
22/05/50	Maurice v Hulton Press ltd	1
05/07/50	Fine v Saunders	64
12/07/50	Russell Bros (Builders) Ltd v Baker & Son	66
27/10/50	Charlton Decoration Co Ltd v Murray	67
02/11/50	Bullen v Imperial Tobacco Co Ltd	69
08/12/50	Bright Graham Murray & Co v Burns	82
11/01/51	Palmer's Hebburn Co Ltd v Grimsby & Son Fishing Co Ltd	95
22/02/51	Falcon Concrete Ltd v D	105
01/06/51	Peterson D Limited	172
22/07/51	T J Kendall & Co Ltd v ATA Scientific Ltd	173
02/10/51	Universal Shop Fitting Co (London) Ltd v Creamery Fair (London) Ltd	
5/10/51	Cranham Antiques Ltd v Sydney Hilman	
17/10/51	Wilson v Miller	

JUDGES NOTENOTEBOOK NO 57

Sir Tom Eastham QC Notebook 57

File No. J114/16

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/16	HPIM2125	18/05/50	Granis Seeds Ltd v The Horticultural and Botanical Association Ltd	Question settled out of Court	
J114/16	HPIM2125	22/05/50	Cyril Lawrence Ltd v Hulton Press Ltd	Building claim for £6,825.12s.3p. Judgment granted to £2,250 under Order 14. However Architect in this case had other claims with regard to his fee scale under standard RIBA conditions. The Architect carried out various aspects of design works on various properties against the Defendant and claimed increased prices in respect of work carried out; some of this work was in respect of war damaged property which was structurally dangerous which enhanced his fee; other works had additional costs subject to variations. Question of quantum merit and inclusion of surcharge in his bills; several experts giving evidence as to reasonableness of Architect's fees; not exceptional but difficult. Not usual practice for an architect when works have been abandoned to obtain commission on a provisional sum or on contingent sums.	
J114/16	HPIM2149	24/05/50	Maurice v J Hulton Press Ltd	Matter of three accounts for abandoned work. Matters of prime cost items and pc sums. (this may relate to previous entry). Court gave judgment for	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				Plaintiff for £1,702.10s.5p with costs to be taxed less £35. Money in Court £1,254 to be paid out to the Plaintiff in part satisfaction of Judgment. Leave to proceed under the Emergency Powers Act 1943 to enforce judgment 7 days from date of judgment.	
J144/16	HPIM2156	05/07/50	Hyman Line v Bertrand Percival Summers	Landlord and tenant claim for forfeiture of three leases at nos 7, 8 9 Lenster Gardens. Judgment for Plaintiff for £1,175 with costs to be taxed. Judgment also for Plaintiff on counterclaim with costs to be taxed order that Plaintiff recover possession of No 7 and 8 Lenster Gardens Paddington forthwith. Leave to proceed under Emergency Powers Act 1943 to enforce judgment in 14 days from date of judgment.	
J114/16	HPIM2157		Russell Bros (Builders) Ltd v Bacon (Male) and Bacon (his wife)	Leave to amend title of Writ by adding A E Bacon Male and E Bacon his wife. Judgment given for Plaintiff for £80 against Defendants jointly, ordered Defendants to pay to Plaintiff within 28 days from 12 July 1950 £55 the agreed costs of proceedings leave to proceed to enforce judgment in 28 days.	
J114/16	HPIM2158	27/10/50	Charlton Decoration Co Ltd v Robert Murray	Referral from Kings Bench High Court Master for payment by War Damage Commission to Plaintiff for £180 further order to instruct War Damage Commission to pay Plaintiff such further	Official Referees Order endorsing expert opinion/ expert determination

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				sums as expert Mr Venn may certify to be due to them.	
J114/16	HPIM2161	02/11/50	Ellis Blanche Beryl Building v Imperial Tobacco Co of Great Britain & Ireland Ltd	Damages for breach of covenant under lease granted 19 September 1939 for 5 years, left in bad condition. Schedule of dilapidations served on Defendant value of work £458.3s. Defendant disputed dilapidations. 9 Burlington Road Ipswich let to County Council; Had to sell to Switch Corporation because it was compulsory purchased. Used as nursing home. Expert gave evidence left in filthy dilapidated condition and walls etc were chipped and knocked about, damage caused by general carelessness. Used as nursing home but required extensive redecoration after its misuse. Court ordered by consent of payment out of court of £250 to Plaintiff's Solicitors without further authority and order that Defendants pay to Plaintiff's Sols £87.10s agreed costs.	
J114/16	HPIM2167	08/12/50	Bright Graham Murray v CJ Burns	Claim for £175 in respect of professional fees and charges of Chartered Accountant; client very satisfied with accountants fee although later on client said fee was a bit steep £80-£100 probably reasonable – matter of account.	
J114/16	HPIM2172	11/01/51	Palmer's Hebburn Co Ltd v The Grimsby Steam Fishing Vessels Mutual Insurance and Protecting Co Ltd & Shire Trawlers Ltd	Claim for damage to trawler. Trawler stranded in Norway repairing damage due to submergence at time when converting coal	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				to oil burning. Part heard and adjourned 11 Jan 51 by consent agreed between parties 12 Dec 51 at First Defendants paid to Plaintiffs £18,000 in satisfaction of the claim and a release of £2,949 out of monies held in joint account; that First Defendant pay Plaintiff's costs of action against both Defendants to be taxed or agreed with further order for payment out of £15,051 in Court to Plaintiff and release of monies in joint account.	
J114/16	HPIM2179		Falcon Construction Ltd v J E Dulieu	Building claim, owner made two payments to Claimant but then excluded contractor from site – War damage work, contractor agreed to service work if immediate application was made to War Damage Commission, commenced again, Plaintiff could not supervise work was prevented by Defendant; Plaintiff was recalled and asked about this said he would be willing to sign necessary forms to facilitate matters, disagreement over payment clause condition 5 of contract; question for Court what were the terms of the contract to be determined in meantime Judge reserved position agreed between parties that they would make a claim to War Damage Commission for payment of war damage repairs.	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				Judgment given on 31 May 51 for payment for £4.10s without costs.	
J114/16	HPIM2185	01/06/51	Peterson & Gray v Edworth & Anor	Judgment for Plaintiff for £625 with costs to be taxed. Judgment for Plaintiff on counterclaim with costs to be taxed £300 to be paid forthwith; £100 within 14 days; £100 in 28 days; £100 in 42 days and £25 in 56 days.	
J114/16	HPIM2186	23/07/51	T J Kendel & Co v ATA Scientific Progress Ltd	Claim for £168.5s.1p costs plus 15% type contract; works progressed but further work necessary; dispute over whether contractor agreed to prepare roof.	Preliminary issues; was it costs plus contract or was it lump sum contract? If costs plus was the work properly carried out? If so, how much? Further preliminary issue as to what was the oral contract?
J114/16	HPIM2188	02/10/51	Universal Shop Fitting Co (London) Ltd v Creamery Fair (London) Ltd	Claim for damages for £3,218.8s.9p shop premises. Fitting premises for ice cream bar and café. Contract terminated but no complaint as to bad work; no claim for delay; substantially completed by June 52. Held Defendants to pay the Plaintiff £2,000 £1,000 to be paid before 15 Oct 51; payment was guarantee on one of Defendant's directors personally, Plaintiffs delivered to Defendants on or before 15 Oct 51 two spoon sinks with their cabinets.	
J114/16	HPIM2192	05/10/51	Cranham Antiques Ltd v Sidney Hillman	Claim for £722.19s.6p. Claim in respect of two items of furniture held Defendants do within 7 days of date of	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				judgment pay Plaintiff sum of £150 in full and final settlement all daughters bedroom furniture to be delivered up to Plaintiffs.	
J114/16	HPIM2194	17/10/51	Wilson v Miller	Proceedings were stayed on basis that claim and counterclaim was withdrawn and that Defendant paid Plaintiff sum of £235 within 28 days. All outstanding sums being fees due to Plaintiff under War Damage Commission on Defendant's property be retained by Defendant. Plaintiff to give full information in respect of Defendant's properties managed by Plaintiff to Defendant's architect and such reasonable assistance without charge as architect may require. Plaintiff to supply Defendant with all vouchers or other evidence supporting all the disbursements in respect of Defendant's properties managed by Plaintiff.	

JUDGES NOTEBOOK NO. 58

Sir T. Eastham K.C.

File No. J.114/17

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/17	SH101125	05/04/51	Fenn v GG & J Barker Ltd	Claim with respect to plumbing work in respect of 8 houses. Difference between parties was £65.4s.8p Judge allowed Plaintiffs to amend pleadings. Judgment for Plaintiff on claim of £149.15s with costs to be taxed. Judgment for Plaintiff on counterclaim without costs.	
J114/17	SH101127	09/04/51	Frederick Charles Flack v E T Brice	Claim for £555.10s for damages for work in respect of shop front and modifications. Defendants refused to allow Plaintiff to complete work until errors were put right. Claim withdrawn on terms endorsed on Counsel's brief (Eastham son appeared before him in the case, this is the second case in the previous month that Eastham's son had appeared before him) previously Eastham's son had won the case.	
J114/17	SH101129	11/04/51	Violet Ursula Helis v William Arthur Dovell	Matrimonial property dispute, judgment for Plaintiff £10 specific delivery of HMV radiogram valued at £15, referred to in Statement of Claim without costs, Judge further directed costs of the Plaintiff Defendant respectively be taxed between Solicitor and Client in accordance with third schedule to Legal Aid and Advice Act 1949.	
J114/17	SH101131	12/04/51	Tabbanor v Fundaminski	Claim withdrawn parties settled claim before hearing.	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/17 p.165	SH101132	19/04/51	Frederick Baden Powell Weil v John Southern	Lease claim for dilapidations, cost of making good £1903, injury to reversion. Included American bar clubhouse, main drive turning circle and tennis courts; £1,230 would be cost of putting tennis costs in order. Expert thought £60 would be sufficient.	Judge directed that in view of discrepancy between figures he would inspect the premises in the presence of both Counsel and Plaintiff and Defendant. Noted "I viewed the premises I the presence of Counsel and the parties Counsel agreed that no further evidence was necessary. Judge gave view that injury to the perversion after his inspection was £3,243. He granted relief from forfeiture on condition Defendant paid £3,243 on following instalments; £1,240 on 14 days from day of judgment; £1,000 in 1 month thereafter and £1,000 six months later. Defendants to pay Plaintiff costs of claim and counterclaim as between Solicitor and client in 1 month after taxation. In default forfeiture with costs of the claim and counterclaim to be taxed as between party

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
					and party and judgment for mean profits up to date of possession is given and rate of £1,040 per annum.
J114/17	SH101136	23/04/51	Gibbons v Don Everal Ltd	Claim involving engineers and introduction of business; terms of memorandum; contract in Pakistan; On Defendant's submissions judgment was given for Plaintiff on claim for £750 with costs to be taxed. Judgment for Plaintiff on counterclaim without costs.	
J114/17	SH101138	24/04/51	Bristow v Get	Plaintiff Estate Agent insurance and mortgage broker; war damage claim. Defendant discussed purchase with Plaintiff and asked his advice and then selling at profit. Asked Plaintiff to assist her in paying for repairs in doing so she agreed to repay loans plus £100; Plaintiff then began negotiations for purchase of freehold. Premises purchased in December 1950 and repairs put in hand. Licence obtained. Defendant instructed builder, decorator and electrician. Work began in Dec 50. Some evidence of bad workmanship in repair work. Judgment given for Plaintiff on claim for £456 with costs to be taxed. Judgment for Plaintiff on counterclaim without costs. Order for money in Court £220 to be paid out to Plaintiff in part satisfaction of	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				Judgment.	
J114/17	SH101141	25/04/51	Rutter v Dean	<p>Damages for loss of use of machinery and raw materials. Concerned ice cream making machine. Ingredients used for ice cream flour, gelatine or gum, sweetener, lactose, glycerine. Question before Court was productivity of machine and quantities that machine would produce; dispute about rates of production whether 21,000 gallons or 17,850. Complex facts. Technical issues. By consent damages for Plaintiff £5,000 to be set off against the sum of £5,000 due by Plaintiff to Defendant, little amount of costs in judgment before Mr Justice Stable to include costs of counterclaim to be taxed or agreed. Amount of costs of enquiry before Official Referee to be taxed or agreed. Sum of £400 due by Defendant to Plaintiff to be paid in instalments of £100 per month. This was an enquiry before Official Referee</p>	
J114/17	SH101144	30/04/51	William Bailey & Sons (Builders) Ltd v Metropolitan Storage and Trading Co Ltd	<p>Damages for defective roof, heavy case; 5 Counsel involved; expert evidence produced; photographic evidence produced, several buildings, numerous items in Scott Schedule and in expert reports; building flooded in 1949; lax amount of evidence but parties came to agreement and judgment was given by consent for Plaintiff on claim for £900 with</p>	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				costs to be taxed. Judgment for Plaintiff on counterclaim with costs to be taxed Order for money in Court namely £600 to be paid out to the Plaintiff's Solicitors on the usual authority in part satisfaction of judgment. Liberty to either party to apply.	
J114/17	SH101149	03/05/51	Ernest William Hughs v Dudley Harris Ltd	Claim for £213.9s.8p for work done dispute over application of licence. Work at Grays Inn Road. General building work, partitions, sinks, basins, electrical work and decoration. Premises to be used for commercial photography. Work permitted up to maximum of £1,000 without licence. Builder ignorant of licence provisions expert evidence given by surveyor as to sq footage and as to it being designated building within appropriate statutory requirements. Judge then satisfied that premises were designated building within provision, judgment for Plaintiff for £153.9s.8p with costs to be taxed.	
J114/17	SH101151	08/05/51	Shuttleworth v Baker	Unknown. Judge heard Solicitor Sir W F Broadbent evidence as to letter being produced from Defendant's Solicitors and Judgment given to Plaintiff for £279.1s.9p with costs to be taxed including costs of application before Master.	
J114/17	SH101151	24/05/51	H & J Wilson Ltd v William Hewitt Farmer	Damages for non repair under terms of lease.	Official Referee Tom Eastham

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				<p>Costs of doing repairs was injury to the reversion. He assessed Plaintiffs injury to reversion as £125 excluding all damage by dampness. No damages for trespass. NB claim for negligence not satisfied that onus on Defendant as burden of proof has been discharged Judge not satisfied that damage claimed had actually resulted from alleged negligence. Judge dismissed counterclaim and gave judgment for Plaintiffs for £125 on claim Judgment for Plaintiffs on counterclaim costs to be dealt with subsequently by Official Referee.</p>	dealt with case as a jury.
J114/17	SH101154	18/06/52	H & J Wilson Ltd v William Hewitt Farmer	<p>Argument as to costs. Question of emergency certificate for Legal Aid and unless time was extended Counsel conceded that he could resist an application for ordinary costs taxation. Added to judgment that Defendant pay Plaintiff's costs of claim and counterclaim to be taxed such costs to include attendance by Counsel before Judge on taxation.</p>	

JUDGE'S NOTENOTEBOOK NO 60

File No. J114/20 Sir Tom Eastham QC (1951 – 53)

Date	Case	Page
29/01/51	Palmers Hebburn & Co Ltd v Stanhope Steamship	1
10/07/51	Parrin & Co Ltd v Harry Green Ltd	2
16/07/51	Cook v Withick	45
19/07/51	Davidson Engineers v Stephens & Brotherton Ltd	57
07/11/51	H Corry & Son Ltd v Taube	92
19/11/51	Harris v Reynolds	105
29/11/51	Clark v Merton	138
04/12/51	Looby v Bullock	149
28/01/52	M B (Construction) Ltd v Nobel	177
29/01/52	Sutton v Ring Publications Ltd	197
30/01/52	Lancaster v James Carter & Partners Ltd	198
31/01/52	Robertson v Watkins & Anor	199
03/07/52	Adams & Anor v Selborne	241
07/07/52	Wilson v Gae	250
08/07/52	Knibbs v Goodhale Engineers Ltd	251
10/10/52	Sattenthwaite v Potter	270
13/10/52	Simon v Gilbbons	279

and Files; J114/2-6 Sir T. Eastham K.C (1945-49)

JUDGES NOTENOTEBOOK NO 60

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/14	CIMG0079.jpg	11/01/50	Hianco v Taufords & Co Ltd	Question as to the value of rabbit skins. By consent the claim and counterclaim were withdrawn and there was no order as to costs	
J114.14	CIMG0081	23/01/50	Woodcock Marshall & Co Ltd v J I Trussom (Widow)	Re 2 Auriol Road Contract to comply with local bylaws works to be to the satisfaction of the architect - ...Plaintiffs with costs to be taxed	
J114/14	CIMG0085	13/02/50	Ronald McGregor & Son Ltd v Harold Andrews Grindley Ltd	Preliminary issues as to what was the contract between the parties in particular what were the repairs the Plaintiffs undertook to do? What is a reasonable price for the repairs actually carried out; were the repairs reasonably well executed, if not what damages? Were Plaintiffs guilty of delay in executing repairs and if so what damage?	Preliminary issues
J114/14	CIMG0087	08/05/50	Callow & Wright Ltd v Morganstern	Claim for loss and expense on building works £73.15.7	
J114/14	CIMG0090	13/06/50	D & L Stephany Ltd v Millicent (Birmingham) Ltd	Dispute as to manufacture of dresses not being fit for the purpose	
J114/14	CIMG0091	04/12/50	Dorey & Son v Foster	Issue as to licence being in place for lawfulness of works; breach of condition to inform Licensing Officer as to commencement of the works started in December 1948; breach of Rule 8 of Defence General Regulations 1939; Licence revoked; electrical work not within the scope of the licence; going on scope of works within the licence £584.0.4; rest	Preliminary issues tried by Referee at preliminary hearing.

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				of the matter to be tried at trial.	
? Notebook 60	HPIM1125.jpg	10/07/51	Pepper & Co Ltd v Harry Green Ltd	Dispute over colour prints and cartons required for the same. Were goods in accordance with the contract conditions? [Judges Note: Judgment for the Plaintiff on the claim £149.19s.6p with costs to be taxed. "I disallow all costs incurred by the Plaintiff's Solicitors in obtaining evidence of an independent surveyor and his attendance in Court".	Preliminary issues considered by Referee halfway through case: what was contract between parties? If contract was sale by sample was bulk in equants with sample? Was the 16 April 1950 delivery merchantable in terms of colour and packaging, delivery complies merchantable cartons?
Notebook 60?	HPIM1141.jpg	19/07/51	Davidson Engineers v Stephens & Brotherton Ltd	Question of conversion. If it was conversion what is the proper date for assessment of damages? Was there a market for the goods, if there was no market establish then did sellers know what the Plaintiffs were going to do with the goods. Concerned the sale of 2million yards of wire encased in polydeanolchloride. Judge considered specific goods, ascertain goods, passing of property Section 18 Rule 1 Sale of Goods Act 1883 and Factors Act 1889.	
Notebook 60	HPIM1151.jpg	19/12/51	Harris v Reynolds	Sale of second hand car and repairs to car and cycles.	
	HPIM1156	29/12/51	Clarke v Martens	Claim for damages for breach of covenant for want of repair; injury to the reversion and cost of repairs.	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
Notebook 60	HPIM1159	04/12/51	Looby v Bullock	Dispute as to valuation of building contract works.	
Notebook 60	HPIM1160	26/01/52	HWB (Construction) Ltd v Noble	Claim for damages for breach of contract and building defects.	
Notebook 60	HPIM1161	29/01/52	Sutton v Prime Publications	Claim withdrawn, order by consent, counterclaim withdrawn no order as to costs.	
Notebook 60	HPIM1163	31/01/52	Roberts v Watkins & Sons	Application to amend Defence, no objection by Plaintiffs, amendments allowed. More damage claim.	
Notebook 60	HPIM1176	07/07/52	Wilson v Crac	Non payment of invoice	Parties settling case on Defendant's submission. Judgment for Plaintiff for £216; Judgment for Plaintiff on the Counterclaim without costs. Payment immediately of £175 with balance payable on 1 August 1952.
Notebook 60	HPIM1177	08/07/52	Knibbs v Goodhale Engineers Ltd	Building contract	Preliminary questions: was it a contract by conduct? Whether the Plaintiff was entitled to £30? Was the water pipe installed on the Defendant's express orders? List of variations (14)
Notebook 60	HPIM1179	10/10/52	E.Sattenthwaite Ltd v Potter	Trial of the preliminary issue Question of construction	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
Notebook 60	HPIM1183/1185	13/10/52	Simon v Gibbons	Damage to goods: conversion goods: application for leave to proceed to enforce the Judgment to be made in Chambers. Liberty to settle parties to apply	
J.114/2	HPIM 1185	27/3/45	The Great Western Railway Company v Port Talbot Dry Dock Company Limited	Repairs to dredger – insured under a value policy for £30,000 old boat of 32 years of age. Life of the dredger was 25 years. Whole operation done by the Ocean Salvage Company with sanction of the admiralty.	
J.114/3	HPIM1193	11/11/46	Johnson v Johnson	Debt claim – judgment for £100 and agreed costs. Leave to proceed but suspended so long as Defendant pays £10 on 20 Jan 1947 and £10 on 20 th each subsequent month.	
J.114/3	HPIM1193	06/03/47	Allied Ltd v Peerless Representative (London) Ltd	Claim for £200.7sh.1p claim by shipping agents. Claim for commission. Disputed items valued at £24.8.2p	Consent Order made and action settled on terms – intervention of the Judge to procure settlement
J.114/3	HPIM1195	10/03/47	London and Canterbury Motors (A Firm) v B L Koppen	Car repairs – damages	Case settled on terms that Judgement for the Plaintiffs for £85 costs agreed at £31.10sh. leave to proceed on terms set out in the order on consent. (settlement effected immediately in Court subject to Defendants paying to the Plaintiff sum of £16.10sh within 7 days of the date of the order

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
					and the balance of £100 being paid by Defendant to Plaintiffs in four equal weekly instalments in the sum of £25 commencing on 9 March 1947
J114/3	HPIM1197	1947	Jays & Co (Engineers) Ltd v Housegoods Limited	Delivery of 9,000 frames in 1944 and 1945 to the Plaintiffs; problems over production and quality of specification; frames were not right for cigarette machines to be fitted – number of causes preventing machines working properly	
J114/3	HPIM1202 HPIM1203	12/11/47	VW Mann & Son v Masterman	Claim for £116.19.9 disputed Building works claim for additional work; abandonment of site and termination of contract. House had been damaged by enemy action during war leading to repair works. Judgment for the Plaintiff with costs ordering the return of 6 rolls of wallpaper; 7 rolls of wallpaper and 25 yards of border paper! Judgment for the Plaintiff in the sum of £116.19sh.9 with costs to be taxed. Order for money in Court to be paid out £55.2p. Judge noted that if this matter was appealed he would write a note to the Court of Appeal	
J114/6	HPIM1208	12/12/47	Rowlett Engineering Co Ltd v C.R.VT.C. Ltd (trading as Champion Electric Corporation)	Claim for £542.7sh.6p in respect of boiling ring cases (2000 in number) at 4.6p eaCh Defendants to pay Plaintiffs against delivery at Plaintiff's	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				premises and Defendants to re-quote to the Plaintiffs in respect of electric iron parts held by Plaintiffs if free quotation not acceptable Plaintiffs to pay for work done to such parts on the basis of the original quotation.	
J114/6	HPIM1210		Buckley James Unwin & Peggy Unwin v John Benjamin Ruage	Claim in respect of engines not working and other matters value £931.15sh.9p.	judgment given for £931.19s.8p with costs
J114/6	HPIM1212	06/02/48	Hunter v Hunter	Matrimonial dispute over items of property over 164 items in dispute. Items from Maples and Pitmans in dispute; property bought at Biarritz; some goods sold by the husband others taken by the Germans	Judge gave judgment £300 with costs to be taxed in favour of the Plaintiff wife.
J114/6	HPIM1217	16/02/47	William George Mellie v Mrs A Mellie (married woman)	Claim for damages for items of property. Value of £393.16sh.8p.	Case settled subsequent to an adjournment 06/04/48
J114/6	HPIM1219	03/05/48	William Jolley v Morris Moss	Damage to articles at leased premises. Built 1936 for a cost of £1,200. Claim for dilapidations. Damages for disrepair. Damage and misuse of property; claim for replacement value; furniture damages; grandfather clock smashed up; piano had 12 hammers broken etc.	Judgment for Plaintiffs £250 with costs to be taxed. Money in Court £80 to be paid out to Plaintiff in part satisfaction. Plaintiff given leave to proceed to enforce judgment suspended for 14 days.
J114/6	HPIM1223	10/05/48	Grince Bros v CG King & Sons Ltd	Defendants in liquidation. Defendant not appearing. Proceeding stayed with liberty to apply.	11/05/48 Defendant still not appearing. No evidence of any application to strike out etc.
J114/4/5	HPIM1224	28/05/48	James Pritchard v Enid Bellanger (Married woman)	Matrimonial property dispute; 24 items of personality in dispute;	
J114/4/5	HPIM1227	07/06/48	J Brennan (Willesden) Limited v A Fondana	Claim for value of building works claim for £882.5sh damage claim. Claim for maintenance work	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				caused by dilapidations some of the work was war damage. One third was war damage.	
J114/4 & 5	HPIM1229	11/06/48	Benefaire Wall Finishes Ltd v Frederick D Sales	Claim for £108 re No 10 Russell Gardens agreed price for work £460. Patching up operation lump sum contract for £460.	
J114/5	HPIM1232	28/06/48	Benoir Hamburges v Winifred Stort	Claim for damages for dilapidations 36a Holland Park Ave, Kensington, War damage, excessive claim; price is too high; cleaning, redecorating and re-pointing required in controlled premises. Expert gave evidence that damage was somewhere in the region of £50 Referee assessed injury to the reversion at £95 gave Judgment for the Plaintiff for £95 with costs to be taxed on Scale C of the County Court Scale.	Referee gave County Court Judge discretion in increasing any items in the County Court Scale that could be increased by the County Court Judge or a Registrar.
J114/4/5	HPIM1779	30/06/48	Hon. Mrs Courtney Cecil (Fem Sol) v D Ewell (spinster)	Nuisance action defective rainwater pipe.	Judge took view of premises on 30 June 1948. 24 May 1948 important meeting by surveyors for the parties they agreed a schedule. Agreed that dry rot was caused by defective rain water down pipe. Liability £446. Judge held that judgment given to Defendant on the claim without costs. Judgment for Plaintiff on the counterclaim without costs. Plaintiff to have

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
					liberty to withdraw the money in Court namely £295.15s. The Judge's noteNotebook was signed by Counsel E Emmett and by Mr Price. Judge said Plaintiff was entitled to £263.10s although there was in Court £295.15s.
J114/2?	HPIM1784	29/01/46	Frank Davis v Solomon & Hime Town Hall Hanley	Damages for breach of an easement. Judgement for Plaintiffs for £100. Judgement for Defendants for £20. Leave to proceed to enforce judgment under the Court's Emergency Powers Act 1943. Order for payment out of £35 paid into Court.	
J114/2	HPIM1790	04/46	Plant Machinery & Accessories Ltd v H P Thomas Ltd	Claim for damages for defective boiler. Trial was adjourned and order for money in Court £200 to be paid out to Plaintiff's Solicitors. Each party to pay half the Court fees for the day.	
J114/2	HPIM1790	20/05/46	Carl Halle v I Lewis	Claim for £201.15s.6p alleged war damage repairs claim. Judgment for Plaintiff for £102.6sh with costs to be taxed. Leave to proceed to enforce judgement under the Emergency Powers Act 1943.	
J114/2	HPIM1791	05/46	Horton Griffiths (Plant) Ltd v Paulet Lines Construction Co Ltd	Building claim. Negligence, hire of plant. American manufactured machinery defective. Judgment for Plaintiffs for £553.6s.4p. Execution suspended	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				for 14 days under the Emergency Powers Act.	
J114/2 J114/2	HPIM1793 HPIM1793	11/11/46 11/11/46	Arbitration reference Steven John Duquemin and Atlas Assurance		
J114/2	HPIM1794	17/12/46	The Most Nobel Hastings 12 th Duke of Bedford v Augusta Marie Friallie	Trial adjourned subsequent settlement on 14 March 1947.	
J114/2	HPIM1795	05/47	Benjamin Thomas v Fire Brigade Union	Claim for damages for £125 with costs agreed at £25.	
J114/2	HPIM1795	07/05/47	Modern Telephone Co Ltd v J.G.P (eligible)	Breach of contract. Sum due under the contract £232.12s.6p. Judgment given for that sum plus costs to be taxed. Claim admitted.	
J114/2	HPIM1796	13/5/47	E S Moss Ltd v J Gremel	Claim for work done £140.4s.8p	Judge dealt with case as a jury. Judgment for Plaintiffs of £250 and costs to be taxed.
J114/2	HPIM1798	?1947	Reginald Richard Trowbrough v Douglas Roberts t/a Douglas Roberts	...merchants – only issue of whether there was a condition of the agreement saying that the Plaintiff should return to Defendant's service after the war	Judgment for Plaintiff of £263.2s.4p. Judgment also for the Plaintiff on the counterclaim with costs to be taxed.
J114/2	HPIM1800	16/12/47	H Bacon & Son Ltd v Jeffrey Mellor	Claim for £183.3s.1p. claim for work done under the War Damage Act. Judgement for Plaintiff for £183.3s.11p with costs to be taxed. Judgment for the Plaintiff also on the counterclaim with costs to be taxed.	
J114/2	HPIM1804	12/04/48	Lewis v Barber	Dispute over materials supplied.	
J114/2	HPIM1805	12/47	Stephen John Clegg t/a Universal Precision v Park Street Engineering Works	Materials supplied not in accordance with specification under the contract.	
J114/2	HPIM1806	14/03/47	The Most Nobel Hugh Richard Arthur Duke of Westminster v Arthur Charles Beueouer eyed	Application to amend Defence, landlord and tenant matter.	
J114/2	HPIM1807	20/11/47	Zenith Skin Trading Co Ltd v Frankel	Price of furs and whether they were	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				fixed.	
J114/2	HPIM1808	29/01/48	HT Jay & Sons v South Eastern Joinery Works Limited	Action on an account as to costs of material	Case withdrawn agree sum of £135 plus taxed costs to be included within that sum
		06/48	Carmino Paobillo v Teresa Gilsan	Partnership dispute and agreement to pay clear profits. Settlement Order that the Plaintiff undertook to take all necessary steps to execute all necessary documents to transfer into the Defendant's name the deposit account the Abbey National Building Society. Claim to be withdraw. Counterclaim withdraw. Plaintiff relinquishes all claims to monies in said deposit account and had to pay Plaintiff £100 in full and final settlement. Parties to pay their own costs.	

JUDGES NOTENOTEBOOK NO 64

File No. J114/23 (1952 – 53) Sir Tom Eastham QC

Date	Case Name	Page No
19/03/52	Knippmen v Attorney General	1
26/03/52	Freund v Wells	17
27/03/52	Brown v Goodfellow	37
31/03/52	Laindon v Elliott	39
01/04/52	Bowbean v Alberton	52
19/05/52	Rowcliffe v Green	53
24/06/52	Ward v Grisewood & Fox	96
14/07/52	Irving v Blake	108
21/07/52	Southdown Casings Co v Osbourne	127
07/11/52	S A Dibbs Ltd v Needleman	169
24/11/52	Dawes v Papadimitiou	204
25/11/52	E Dawson (Lamp Factors) Ltd v Enfield Electrics	207
01/12/52	F G Minter Ltd v Greene & Ors	206
13/01/53	Rothkins v Evely	238
10/02/53	Manly & Manly v Grindlay	256
30/06/53	Morton Owen & Co v Gainsborough (Arts and Educational Materials) Industries Limited	264
02/10/53	Cassidy v Lawrinson	265
07/10/53	Burcon Ltd v J A Tyler & Sons Ltd	267

JUDGES NOTENOTEBOOK NO 64

J114/24 – Sir Tom Eastham KC 1952 – 1953

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/24	CIMG525/ CIMG0526	20/03/52	Knippnen v Attorney General	Claim for damages arising out of lecturing tour. Three heads of claim; value of transparencies/photographs, loss of revenue and damages suffered as a lecturer together with loss of publicity. Claiming £500 damage suffered as lecturer and £800 costs of trip to South Africa and Southern Rhodesia. Tour took 6 months took 400 colour pictures; published in February 1952; expert gave evidence as to 10Guineas to 18Guineas for reproduction of one photograph. Judgment for Plaintiff £710 with costs to be taxed. Order that money in Court of £530 be paid out to the Plaintiff's Solicitors on the usual authority in part satisfaction of the Judgment.	
J114/24	CIMG0534	25/03/52	Freund v Muller	Claim for £610 value and damages for goods and detention. Plaintiff left England dispute as to value of items retained. Eastham believed Plaintiff's evidence not Defendants where it conflicted. No conflict of evidence on value therefore he gave judgment for Plaintiff for £610 with costs to be taxed under Legal Aid and Advice Act	
J114/24	CIMG0535	27/03/52	Broom v Goodfellow	Claim for £150	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				Judgment for Plaintiff on counterclaim with costs of claim and counterclaim to be taxed up to date of Defendant's Legal Aid Certificate which was 7 January 52 thereafter no costs of claim and counterclaim.	
J114/24	CIMG0537	31/03/52	Lane v Elliott & Anor	Claim for damages for war damage repair. "If there were adjustments to be made because the Local Authority Surveyor wanted a wall pulled down lower the Defendant's surveyor would be the best man to make the adjustment. The Defendant should pay to the Plaintiffs about 85% of the claim" Judgment for the Plaintiff on claim for £107 cost to be taxed. Judgment for the Plaintiff also on counterclaim with costs to be taxed.	Was work done badly were extras ordered? Extent of what damage repairs. Claim for extras agreed only issue was war damage repairs.
J114/24	CIMG0540	01/04/52	Bowbear v Skelton	Case settlement Judgement as asked immediately given.	
J114/24	CIMG0542	17/06/52	Rowcliffe v Green	Action on an account.	
J114/24	CIMG0543	24/06/52	Ward v Greenwood & Fox	Lease determined by forfeiture. Action for recovery of damages due to dilapidations. Claim for £1,702.10s.0p. Judge assessed damages as against Second Defendant and gave judgment for £1,700. Judgment directed to be entered against First Defendant for £1,700 with costs to be taxed. Judgment to be entered for First Defendant in the action on the claim for an indemnity against the Second Defendant for the amount of the Judgment recovered by the Plaintiff ie £1,700	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				and costs to be taxed which the said First Defendant is called upon to pay to the Plaintiff and also his own costs of defending the action together with the costs of the indemnity proceedings. Plaintiffs Solicitors undertook to issue execution under the said Judgments for any sum exceeding £1,700 with costs to be taxed.	
J114/24	CIMG0546	14/07/52	Irvin & Sons v Blake	Claim for £315.12s.1p building works – were within or outside the specification ie contract works; work done as ordered by the Defendant; judgment for £285.12s.	Stay of execution for 21 days from date of Judgment. If notice of appeal given and endorsed within that time stay to continue. It is agreed Official Referee should state facts and law and his view of the law in writing in the event of an appeal..
J114/24	CIMG0550	21/07/52	Southern Casing Co v Osbourne	Claim with regard to sausage skins – question of whether sausage skins were of the right quality – 10 bundles of wide extra sheep casings; 10 bundles of long hog casings; 10 bundles of first cut New Zealand sheep casings; 50 bundles of sheep casings. Action for damages for sale by sample and sale by description whether sample and description agreed with supply. Examples were correct but bulk was not up to sample. 100 bundles were delivered 24 hrs after delivery they were opened, absolutely useless, full of slime	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				and smelt very badly. Judgment for Plaintiffs for £954.15s with costs to be taxed.	
J114/24	CIMG0559	07/11/52	S A Dibbs Ltd v Needleman & Anor	Building work – specification and estimates. Work carried out under licence; value of variations. Judgment for Plaintiffs against both Defendants on claim for £150. Judgment for Plaintiffs on counterclaim, each party have to pay its own costs; order for Defendants to tax these costs as between Solicitor and client in accordance with Third Schedule Legal Aid and Advice Act 1949.	
J114/24	CIMG0561	10/11/52	SA Dibbs Ltd v Needleman & Anor	Dispute as to valuation of works, order for payment of £100 (money in Court) out to Plaintiff's Solicitors on usual authority in part satisfaction of Judgment.	
J114/24	CIMG0563	24/11/52	Dawes v Papdimitiou	Judgment for Plaintiff for £250 on claim, Judgment for Plaintiff on counterclaim, no order as to costs. Order for payment out of Court of £22.4s.7p in part satisfaction of the judgment on the usual authority.	
J114/24	CIMG0564	25/11/52	E Dawson (Lamp Factors) Ltd v Enfield Electrics (a firm)	£125 with costs paid to be taxed. Execution stayed for 14 days.	
J114/24	CIMG0565	04/12/52	F G Minter Ltd v W Inslade Bros	Judgment for Plaintiff on claim for £1,250 plus £250 agreed costs. Counterclaim disputed as set off and withdrawn (no order as to costs). Judgment not to be enforced so long as £100 paid forthwith and the balance of £1,400 paid by instalments of £100 month payable on 3 rd of	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				each month	
J114/24	CIMG0568	03/10/53	Cassidy v Lawrinson	War damage act claim. No order as to Plaintiff's costs, all further proceedings stayed, order for Defendant's costs to be taxed. Really a County Court action and Taxing Master's attention to be drawn to that fact.	
J114/24	CIMG0571	07/10/53	Burtain Ltd v J A Tyler & Sons Ltd	Liability admitted. Counterclaim only an issue. Defendant sub-contracted plastering works to Plaintiffs £680 counterclaim. At request of Defendant's Counsel withdrawal of any objections on the part of Plaintiff's Counsel Eastham decided to view the premises and see condition of ceiling and lighting of the showroom and general appearance of showroom. He noted that "loss of use" should be limited to the making good of Plaintiff's defective work giving judgment for Defendants on the claim and judgment for Defendants on counterclaim for £72.9s.9p. Plaintiffs to pay the costs of the claim and counterclaim up to 29 September 1953 and all costs subsequent after date except the sum of £30 to be paid by Defendants to Plaintiffs. All costs to be taxed failing agreement. Order for payment of money in Court namely £232.9s.1p to be paid as follows £72.9s.1p to be paid to Defendants and balance to Plaintiff.	

JUDGES NOTENOTEBOOK NO 70
Sir Tom Eastham QC 1954 – 1957

File No. J114/31

Date	Case	Page No
1954		
01/02/54	Stern v Phelps & Son	1
11/02/54	Stannard v Gray	7
15/02/54	PCS Ltd v Lever	31
03/04/54	Dowding & Mills Ltd v Dohn Ltd	76
23/03/54	Davey & Armitage Ltd v Wallasea Bay Yaught & Son Ltd	77
08/04/54	Stern v Topen	87
20/05/54	Biddle Builders Ltd v Rosenfeld	88
31/05/54	Bartlett v LT Executive	89
03/06/54	Myers v Wainwright	96
15/06/54	Houghton v Bone Bros	100
05/07/54	Richmond Shipways v Wyhorn	104
04/10/54	Waia & Peterson Ltd v Bourne	124
06/10/54	WA Bennett Ltd v Stephen Hastings Ltd	130
07/10/54	Gracey v Nedlam Ltd	133
04/10/54	Knight v J F Hill & Son (Camberwell) Ltd	134
10/11/54	Devonshire v Reginald	135
01/12/54	Cripps v Lee Green Motors	152
1955		
13/01/55	Aygee Properties Ltd v Kendall	161
21/02/55	Paj Kunic v Machaurin	162
24/02/55	J Kemp Ltd v Vaughan	173
01/03/55	Lynch v E C Hills & Son	185
04/03/55	Frank W Martell & Co Ltd v Landon Furnishings	190
07/03/55	William Logan & Sons Ltd v G Lit Ltd	191
14/03/55	Nagales v Menitides	199
16/03/55	CBH Construction Ltd v Mills	203
22/03/55	Benton v Wright	209
24/03/55	Cooke & Ors v London Plywood & Timber Co Ltd	214-227
02/05/55	Daniel v Kingsland Die Casting	228
04/05/55	Botchell v Collins	229 – 233
17/05/55	Antson v Chapple	235
04/07/55	Hidden Timber v London Secretarial Services	238
12/07/55	HG Island Ltd v HD Brierly Ltd	239
1956		
28/06/56	Green v G Nickerson & Son Ltd	250
10/07/56	Rankin & Downtown Ltd v Walker	256
11/07/56	Church Commissioners v Brentwood	257
13/07/56	Hewitt v North Suburban Estates Ltd	258
25/07/56	Aerial Cabinet Ltd v Belton Built Furniture Ltd	264
1957		
21/01/57	Totten v Lemmon	269

[File reference SH101177. J114/31. Notebook 70]

JUDGES NOTENOTEBOOK NO 70

J114/31 1954 – 1954 Sir Tom Eastham QC

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/31	SH101178	01/02/54	Stern v A Phillips & Son (A firm)	Negligence and delay. Claim for £1,271.7s.0d plus damages. Judgment for Plaintiffs on claim for £1061.15s.9d and on counterclaim with costs to be taxed failing agreement. Payment of money out of court £300.	
J114/31	SH101180	11/02/54	Stannard v Gray	Claim for £980.6s.5d. Defendant employed by theatre manager was a well known comedienne. His earnings varied. He wanted to convert his business into a Notebookmakers business. Defendant refused on several occasions to pay Plaintiff his money owed despite various reminders. Judge gave judgment for Plaintiff for £980.6s.5d. Considerable amount of oral evidence given by both parties in this case, two demands for payment, promises to pay etc.	
J114/31	SH101190	15/02/54	PCS Ltd v Lewer	Prime cost building contract with Ministry of Health in form NH/PC/1. Here we see complex cases calculating the final account less defects remuneration and prime costs. Judge held acceptance of contract by conduct. Judgment for the Plaintiff £550 on claim with costs to be taxed. Judgement for Plaintiff on counterclaim	Preliminary issues: what is the contract NH/PC/1 or quantum merit claim. Was the work done badly as alleged? If so how much is the Plaintiff entitled to recover? Are the Defendants bound by the Architect's final certificate?

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				without costs other than costs of Counsel setting reply. Money in Court namely £50 to be paid out to Plaintiff's Solicitors on usual authority.	
J114/31	SH101199	02/03/54	Dowding & Mills Ltd v Dohen Ltd	Defendants submitted to Judgment for £670 with costs to be taxed order for payment out of £600 in Court in part satisfaction of the Judgment without further authority.	
J114/31	SH101200	23/03/54	Davey & Armitage Ltd v Wallasea Bay Yacht Station Limited	Action on counterclaim only. This concerned flooding in February 1953 construction of four roads. Action for damage for trespass causing damage, damage caused to grass around bungalows by tractor and trailer as workmen were building four roads what they had done was damaged grass verges and some land in which the public had access to and play cricket. That land also in possession of the Yacht Club. Evidence of damage not extensive. Damage to grass in front of bungalows, not much authority. Trespass continued for five days. Damages awarded £50.	
J114/31	SH101205	08/04/54	Stern v Topen	Case settled on terms endorsed on Counsel's brief.	
J114/31	SH101205	20/05/54	Biddle Bros Builders Ltd v Rosenfeld	Building claim preliminary issues to be decided.	Was the work done? Whose agent was Blanchfield? Are the prices reasonable? Has payment been made?
J114/31	SH101206	31/05/54	Bartlett v London Transport Executive	Plaintiff owned breakfast bar in Bishopsgate, this breakfast bar was damaged by bus	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				accident. Front of shop damaged, claim for damages for damaged property. Some work carried out by lessee laying shop floor, repairs to doors, temporary loss of business and loss of profits. Plaintiff said had former solicitors but they did not act for him and he did not call accountant because he had attended former Solicitors offices. Building was bomb damaged, expert evidence given as to accounts by Defendants, disclosed in 1951 a 15% rise in prices Judgment for Plaintiff in sum of £734.	
J114/31	SH101209	03/06/54	Myers v Wainwright	Claim for professional fees as surveyor in regard to dilapidations claim and War Damage Act claim.	
J114/31	SH10211	15/06/54	Houghton & Anor v Bare & Ors	Landlord and tenant – Schedule of Dilapidations, issue as to what is the cost of repair and whether that is the same as the damages to the reversion. Expert evidence called with regard to decorative items. Argument as to whether work was necessary and prices fair and reasonable. Referee required to assess damages, he assessing damages in sum of £322 action adjourned for consideration by parties for date to be fixed.	
J114/31	SH101213	05/07/54	Richmond Alexways Ltd v Wyborn	Claim in respect of damages regarding manufacture of boat, cabin cruiser. Issues over ventilating system, engine and 16”	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				propeller. Difficulty with design of boat, expert gave evidence to effect might not be able to make port, insufficient ballast put in boat. 30' cabin cruiser, boat was too slow, did not do more than 6knotts should have done 61//2-7 knots. Trial went on for six days, Judge gave judgment possibly for £150 Judges judgment not given in this noteNotebook.	
J114/31	SH101223	04/10/54	Ward & Patterson Ltd v Trainim	Claim for defective works. Repairs plumbing and decorations, bad workmanship, damage to woodwork and furniture, defective plumbing, quantity surveyors evidence as to repairs and alterations and quantification, standard of workmanship not good. Referee does not give judgment, its not Tom Eastham, looks like damages given at £91.10s.	
J114/31	SH101226	06/10/54	WA Bennett Ltd v Stephen Hastings Ltd	Dispute over the weight of goods, carriage of goods, interpretation of bill of lading. Goods handled to carriers weight on weighbridge. Judgment for Plaintiff for £212.16s with costs up to 20 August 1954. Judgment for Defendant for £77.8s.8d with costs.	
J114/31	SH101228	07/10/54	Garey v Nedlam	Claim by builder on schedule of dilapidations, claim for non payment of costs of works £1,231.5 no judgment noted.	
J114/31	SH101228	14/10/54	Knight v J F Hill & Sons (Camberwell) Ltd	Action stayed on terms evidenced on Counsel's brief liberty to apply.	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/31	SH101229	1/11/54	Devonshire & Anor v Raznick & Anor and Raznick & Co Ltd v Devonshire & Anor	Building works carried out on Public House. Cost £1,500 problem of completing works by Easter, job took three weeks with three workmen. Working until 9pm sometimes. Dispute over delay. Job could be done in 6-8 weeks. Payment delayed was to give them partial possession by Whitsun. Builder said if he was not paid he would withdraw labour, employer said he was not going to pay builder. £500 worth of work done, suggestion for £500 to be paid to trustee. Expert evidence given. Delay caused by nominated sub contractor. Kelly Carter gave judgment on claim for £175 with 4/5 of costs. Counterclaim dismissed with costs as was action by company dismissed with costs.	Walker Kelly Carter took over from Tom Eastham on 2 March 1954. His notes are far more detailed and his term of office seems to coincide with a more complex number of references, dealing with delay, loss and expense and problems of repudiation of contraction contracts.
J114/31	SH101237	01/12/54	Cripps v Lee Green Motors	Kelly Carter giving immediate case management directions. This represents exceedingly efficient case management at commencement of a trial. Evidence given as to measured work for £1,395. Client did not want to pay more than £1,000. Defendant left site March 1954. Prices in original bill of quantities according to expert would not be fair method of pricing variations on this job. Evidence of bad workmanship. KC gave judgment for Plaintiff of £45 and £125 plus £35 to cover Claimant's costs.	KC giving immediate directions, issue as to fair price to be dealt with next day; issue relating to estoppel on agreement made by surveyor be tried that day; that time sheets and invoices be disclosed to Defendant's solicitors forthwith by 2pm that day; that all questions of further germane and costs be reserved; that Defendants be at liberty to

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
					serve defence to amended claim and that such pleading be delivered by 10.30am tomorrow morning.
J114/31	SH101242	13/01/55	Aygee Properties Ltd v Kendall & Anor	Defendant agreed to pay £2,000, Judge ordered payment out of £1,500 to Plaintiffs all proceedings stayed and Tomlin Order	First use of Tomlin Order
J114/31	SH101242	21/02/55	Prajkunic v Maclannon	Matrimonial dispute, wife came from Varna in April 1939, dispute over silver and china bought at Harrods. Very sad. Son lived with mother,just after war, had his own property in house but died. Plaintiff interrogated in detail as to her possessions, two days in Court. Third day on Defendant's case Judge gave Judgment on third day. 23 Feb 1955 but not recorded.	
J114/31	SH101247	24/02/55	J Jenkins Ltd v Vaughan	Numerous defects with property, house demolished. Post-war building material not as good as pre-war building material. Non compliance with specification of re-built property. Concrete contained aggregate that was too large. Concrete had to be broken up and re-laid. Kitchen floor "fell to pieces" Threat of dampness and dry rot, green timber. No sufficient ventilation. Case adjourned on third day, terms agreed and endorsed on Counsel's brief.	
J114/31	SH101253	10/03/55	Finch v EC Miles & Son	Row of cottages built about 1300 (14 th Century) Plaintiff paid	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				£1,100 for them but house burned down, house insured for £5,000 contents for £3,000 claim for damages for property destroyed by fire.	
J114/31	SH101254	07/03/55	William Logan & Sons Ltd v Onlit Limited	Claim for value of building work, lack of consideration, errors in bills of quantities, builder priced the job on basis of bill of quantities; using new type of specialist construction method for floors but had no detailed drawings available on which to price works. Builder found omissions and errors on bills of quantity and if they had completed the contract with circle construction they said they would have gone bankrupt. Builder was asked if he would continue to do the work even if it was outside the bill of quantities but builder said they could not continue unless paid for work. Builder threatened to walk off job if he was not paid extra payment; "If work confined to items in bills of quantity formwork would have collapsed". (very strong indications now in these cases of far more complex building cases of the type that prevailed up to the mid 1980s, heavy complex claims that took more than 3 days hearing.	Issues whether duty in negligence; whether there was a contract.
J114/31	SH101258	14/03/55	Nageles v Menikides	Building conversion of premises into hairdressing saloon. Problems over Marley tiles being fitted and ventaxia fans. Dispute over movement of	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				water tanks. Only extras were chairs and dryers. Judgment ordered for Plaintiff for £225 without costs, £25 to Defendants.	
J114/31	SH101260	16/03/55	CBH Constructions Ltd v Mills	Works carried out without supervision of architect. Specification valued at £2,643. Contractor says that work still continuing, Defendant rejects that. Judge said he would deal with matter as preliminary issue on repudiation. Dispute over various items client very demanding and authoritarian ordered extras difficulty of contractor was they had exceeded provision costs items and accordingly they wanted assurance from building owner that he would pay the extra sums involved. Contractor withdrew his men from site after plumber had connected the water services. Building owner threatened to "fight" builder if they did not round off cornices free of charge. Building owner terminated contract. No note of judgment but Judge has marked note Notebook as £100 which he may have awarded to Claimant.	
J114/31	SH101263	22/03/55	Benton v Wright	Defendant was an accountant who worked for Benton Claimant. Claimant had been involved in two divorce cases and Wright accountant acted for Benton in dealing with matrimonial tax matters. Accountants charges 10 ½ guineas for 7 hour day. One day	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				each week. Extraordinary relationship between accountant and his client – claimant asked accountant to take his daughter in, daughter had eloped with someone bigamously married, accountant worked every weekend on Plaintiff's affairs, accountant ended up doing 5 ½ days a week for Mr Benton, did 6 years work covering 10 years tax returns. Kelly Carter found for Plaintiff in sum of £2,839.16s.	
J114/31	SH101265	24/03/55	Cooper & Ors v London Plywood Timber Co Ltd	Claim for timber evidence: "do I get it at my price." "Clear out". "I will put your floor outside the gate". Police sent for (Judges note) Judgment for Plaintiff on claim for £300 counterclaim dismissed. Payment out of £300 in Court to Plaintiff's Solicitors £50 in Court to Defendant's Solicitors.	Agreed that Judge would try the question repudiation first. Preliminary issues: agreement oral. No agreement at all. Claimant quantum merit. Severance of materials.
J114/31	SH101271	02/05/55	Daniel v Kingsland Die Casking Co Ltd	Defendant to pay Plaintiffs with costs up to date of Defence and Plaintiff to pay costs of defence after delivery of defence.	
J114/31	SH101272	04/05/55	Botibol v Collins	Claim for want of repair under lease granted in 1947. Premises were very dilapidated and attempt was made to convert into fish and chip shop. Judge assessed damages at £530.12s Judge dismissed counterclaim and ordered Defendant to pay cost of action and counterclaim. Stay of	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				execution removed.	
J114/31	SH101274	17/05/55	Anton v Chapple	Building claim.	
J114/31	SH101275	04/07/55	Head Thurlow Ltd v London Secretarial Service	Kelly Carter gives judgment immediate for Plaintiff of £175 plus £63 agreed costs.	
J114/31	SH101276	12/07/55	H G Poland Ltd v H O. Brierly Ltd	Managing Director of Plaintiff was old established firm of brokers, question of payment of commission.	Preliminary issues: did agreement agree term Plaintiff should be remunerated by keeping 60% of brokerage for themselves? Were Plaintiffs under liability to account to Defendants; Was money account settled or cleared?
J114/31	SH101281	28/06/56	Green v G Nickerson & Son Ltd	Claim in respect of goods delivered. Second day Judge noted 1.30pm case settled.	Preliminary issues; dispute as to terms of verbal agreement, breach of agreement; quantity no longer disputed.
J114/31	SH101283	02/07/56	WA Phillips Anderson & Co Ltd v Instone & Anor	(Vanoss – for Plaintiff) Dispute over boat. Question as to marine engine. Exhaust pipe too low, issue over engine following day however claim and counterclaim were withdrawn. Result was that £1,250 was paid out to Plaintiffs and £2,220 was paid out to Defendants.	
J114/31	SH101284	04/07/56	Rankin & Downton (Footway) Ltd v Walker	Problem over drains, decorations to back room and maids bedroom, claim work £1,900 parties came to terms, no order.	
J114/31	SH101285	11/07/56	Church Commissioners for England v Boutwood	By consent damages assessed at £3192.	
J114/31	SH101285	/07/56	Hewitt v North Suburban Estates Ltd	Action on leases four schedules of dilapidations. Claim over asbestos roof.	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				Asbestos sheeting was not considered permanent roofing material. Judge delivered a reasoned judgment, gave judgment for Defendants with costs.	
J114/31	SH101288	16/07/56	Ariel Cabinets Ltd v Better Manage Co Ltd	Claim in respect of Notebook shelves and radio cabinets, repairs to furniture. Claim settled. Judgment for Plaintiffs for £550. Counterclaim dismissed, taxed costs on claim £500 in Court to Plaintiff's Solicitors.	
J114/31	SH101291	21/01/57	Totten v Lemmon	Building claim. Complaints about workmanship variations but no proof of variations some lack of evidence reported by Judge, judgment given for Plaintiff £344.17s.3d with ¼ of her costs, order Plaintiffs costs to be taxed for purposes of Legal Aid Act 1949.	

JUDGES NOTEBOOK 75
Sir Walker Carter Q.C. 1955-58; 1960

File No. J114/35 - Notebook 75

INDEX OF CASES

Phillips v Ward	1
Hogg v Barnard	33
Burles (London) Ltd v Aygee Properties Ltd	93
Sharkey v Spencer	94
Titler v Bathurst Brown & Anor	100
Nason v Symons	105
William Mills & Son Ltd v Wybrow	
A Stokes & Co Ltd v Hill	119
Butler v Vaughan	123
McConnell v Grant	133
Beanders Limited v Van Der Elst	138
Crittenden (A firm) v Phillips	146
Secretarial Service v Swefex Flooring Co Ltd	152
Dove Brothers Limited v Scott	154
Wareham v Evans	159
Portman Glass Co Ltd v Sayson & Anor	164
Hopgood v Herbert Richardson & Sons Ltd	165
Hill v Debenham Tewson & Chinnocks	175
Ridley & Ors v Kopsisitzes	197
Cohen v J J Butler Ltd	199
Goodman Jones & Co v Cornwell	206
Raefel & Brown Ltd v Stokes of Cambridge Limited	207
Peters Automatic Mechanics v R.A. Equipment Limited	211
Brailsford Ltd v Lee (at Nottingham)	212
Beechwood Estates Co v Hanbury-Aggs	249
Mahoney v Kent	
George v Russell Brothers	
Heating & General v I Richardson	

JUDGES NOTENOTEBOOK NO 75

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/35	HPIM2763	31/1/55	Phillips v Ward	Building defects damage to property; infestation by deathwatch beetle. Lord Hailsham QC appeared for the Defendant who said "you shouldn't blame the surveyor if an Elizabethan house gives trouble". Claim for negligence. ??as to nature of damages loss of convenience.	Site visit by the Judge
J114/35	HPIM2766	21/11/55	Hogg v Barnard (at Warwick Court)	Claim for value of timber sold (trial lasted 8 days)	
J114/35	HPIM2769	12/01/56	Burles (London) Ltd v Aygee Properties Ltd	Claim in respect of building works. Matter seems to have been settled but the Judge made no Order.	
J114/35	HPIM2770	14/03/56	Sharkey v Spencer	??? not in accordance with appropriate planning approval; code of practice for registered architect, judgment for Defendant payment out of £25 in Court.	
J114/35	HPIM2771	26/03/56	Titler v Brown & Anor	? Action on an account in respect of livestock being pigs, breeding sales, hens, geese duck and farm machinery and other personal assets; value of orchard; which was a wilderness, grass 4-5 feet high. Damages awarded £104.5sh.7p no order for costs.	
J114/35	HPIM2773	04/56	Nason v Symons	Debt claim for £818.16sh.7p. Defendant defaulted in paying debt to builder for work, several properties involved and contracts for work.	
J114/35	HPIM2775	21/04/56	William Mills & Son Ltd v Wybrow	Work done on basis of builders estimate, work paid for in full; allegations of bad	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				workmanship; question over payment of work on daywork rates. Accounts demonstrate that they were made up on a costs plus basis, dispute over charging, alleged agreement to carry out work on costs plus basis. [cases here becoming increasingly complex, no longer fixed lump sum accounts, no longer simple contracts but costs plus day work rates etc coming into dispute, cases would take much more time than cases in the 1940s].	
J114/35	HPIM2777	04/07/57	A Stokes & Co (Builders) Ltd v Hill	Building claim; snagging work carried out automatically; extras agreed subject to larger items of work being estimated first. Builder estimated costs from owners drawings; number of variations and additional works.	
J114/35	HPIM2779	30/07/57	Butler v Vaughan	Claim under supplemental agreement with regard to sale of tractor by way of part exchange. Damages awarded to Claimant £100.	
J114/35	HPIM2780	23/10/57	McConnell v Grant	Claim for remuneration	Preliminary issues; was there any agreement as to remuneration? Was it fair remuneration? What services were included?
J114/35	HPIM2782	09/12/57	Beander Ltd v Van Der Elst	Building contract dispute as to price, Claimants price of £608.2sh.7p Defendants price of £395.4s.7p, Defendants price accepted by the Court together with payment for costs.	
J114/35	HPIM2784	30/01/58	VL. Crittenden (A firm)	Building claim	Transfer from

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
			v Phillips	regarding specific agreement as to value of works in the sum of £400; value of the work and bad workmanship.	Court 1.
J114/35	HPIM2785	14/03/58	Ainslie Secretarial Services (a firm) v Swifer Flooring Co Ltd	Dispute over completion date and layout plans; in respect of labour on job £31.16s.3p judgment for £30.	?Registrar for afternoon
J114/35	HPIM278?	16/04/58	Dove Bros Ltd v Scott	Building contract domestic premises: jobbing builder; works to be undertaken as part of the purchase price of the property fell out with builder and wanted it down by another builder [another example of small domestic building case difficulties arising between the builder and owner who fall out – no possibility of amicable resolution in such cases]	
J114/35	HPIM2788	04/58	Wareham v Evans	Building case with regard to works to electrical works, chimney stack, and other domestic building work amounting to £1,202.13s.9p 192 hours spent on the job, dispute over time sheets, amount of work, quantities. Judgement for the Plaintiff payment out of £75 in Court to Plaintiff.	
J114/35	HPIM2789	29/04/58	Portman Glass Co Ltd v Haysom & Anor	Judgment by consent ordered that Second Defendants costs to be taxed.	
J114/35	HPIM2790	05/58	Hopgood v Herbert Richardson & Sons Ltd	General claim in respect of building works. Claim for delay of £997.10s bad workmanship for £110.9s.1p contra-charge. Judges awarded £3,000.	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/35	HPIM2794	04/06/58	Ridley & Ors v Kopsitzer	Investigations on behalf of Defendant matters: accounts of business, basis of the assets, tax returns, credits, accounts to the dissatisfaction of Brian Blackmore Stephens & Co accountants; the Defendant to make available to the Plaintiff for the purposes of the investigation all relevant accounts in his possession. Defendant to pay the Plaintiffs further sum of £400, £180 towards their costs.	
J114/35	HPIM2795	05/06/58	Cohen v JJ Butler & Son Ltd	Claim in respect of defective work.	
J114/35	HPIM??	13/06/58	Goodman Jones & Co v Cornwell	Claim for building works judgment by consent sum of £102.10s.	
J114/35	HPIM2797	16/06/58	Ratford Brown Ltd v Stokes of Cambridge Ltd	Claim for repair of car £224.12.4p	
J114/35	HPIM2798	08/06/58	Peters Automatic Machines Ltd v R & A Equipment Ltd	Defective machinery delivered cost £415.2s.2p Judgment for Plaintiff given for £415.2s.2p with costs.	
J114/35	HPIM2798	06/07/58	Brailsford v Lee held at County Court Nottingham hence heard from Official Referees Court 2	Application for leave to amend Defence – numerous additional items including damp proof course, brickwork, tiles of poor quality, window frames, general quality of materials. Heard evidence that brickwork was reasonable. Judgment given for Plaintiff for £31.12s.5p.	
J114/35	HPIM2800	07/58	George v Russell Bros (Paddington) Ltd	Trial of preliminary issue that issues of fact as to amount of Plaintiff's loss and expense in completing the house himself and the amount of the sum claimed by the Defendant under the	This is the first clear evidence of a trial on preliminary issue noted by the Official Referees [indicates that this time the

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				contract or on a quantum merit basis be tried after the other issues in the action.	device was coming into more common usage coinciding with more complex building cases being referred albeit domestic ones]
J114/35	HPIM2801	06/60	Beechwood Estates Co v Hambury-Aggs	Claim for building repairs, cost of work £600.	
J114/35	HPIM2802	07/11/60	Charles Mahoney v J W Kent	Claim by builder in respect of variation works carried out qualifications to work required by District Surveyor namely the rear brickwork and concrete foundations.	
J114/35	HPIM2803	14/11/60	George v Russell Bros		
J114/35	HPIM2803	4/11/60	Youngsigns Ltd v S S V Limited	Claim regarding cost of panels estimate £30 less than it was;claim £547.10s.3p OR gave judgment for Plaintiffs for £243.3s with costs up to 11 Oct 1960	
J114/35	HPIM2804		Heating & General Engineering Co (Ltd) v Joseph Richardson Ltd	Building claim. Prices charged were fair and reasonable Judge satisfied work was carried out, no appearance by Defendants, Judgment for Plaintiff £405 with costs against defendant.	

Sir T. Eastham K.C.
File No.J.114/2 1945-46

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/2	IMA0032	03/03/45	Westheath Contractors v Borough of Grantham	Claim concerning 169 building units comprising 63 dwellings	Referee directed parties to agree figures of quantum. Judgment given for Defendants on the claim with costs to be taxed less £70 and judgment for the Defendants on the counterclaim for £3,119.6s.10p with costs to be taxed.
J114/2	IMA0038	09/07/47	Henrietta De Leeman v Shirley Soloman Moss	Marriage settlement dispute, claim over personal property and opposing rights of the parties. Judgment given for Plaintiff for £150 payable to Plaintiff's Solicitors by instalments of £2 on first of each month beginning on 1 August 1947	
J114/2	IMA0043	07/45	HSA Productions Ltd v AA Shenburn	Claim for £253.18s.8p judgment for £250 with costs to be taxed	
J114/2	IMA0044	16/10/45	Reginald Alfred Boswell v P Pechelsky	Claim for £1,800 under two agreements. Defective machine. Judgment for Defendant on claim judgment for Plaintiff on counterclaim ordered Defendants to pay £100 in respect of costs.	

Sir T. Eastham K.C.
File No. J114/1 1944-48

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/1 T Eastham KC 1944-1948	HPIM1735	/11/44	Lewis (Wollens) Ltd v Judd Bros (a firm) Civil Court Town Hall Leeds	Claim for delivery of goods. Judgment given for Plaintiff of £220.12s.11p with costs to be taxed. Application for leave to proceed to enforce Judgment to be made in Chambers.	
J114/1		27/11/44	Great Western Railway Co v Port Talbot Dry Docks Co Ltd	Claim with respect to damage to dredger Don Frederico. Don Frederico sank in dock at time Battle of Atlantic was at its height. Vessel capsized on its starboard side. Could not salvage the ship. Plaintiffs employed Ocean Salvage Company. They did the work paid £2,596.3s. Took 4 months to clear the entrance to the dry dock. ...Southborough's charges were excessive – presumably for lifting the dredger. Difference between the parties Defendants said £4,846.14s.9p, Plaintiff said £8,969.14s.9p. Judge held £42,567 in judgment with costs to be taxed. Judgment for Plaintiff on County Court scale with costs to be taxed.	
J114/1 (p51)	HPIM1742	21/10/46	Johnson v Johnson	Matrimonial dispute. Husband earning 7Guineas a week as a builder. Judge awarded £100 balance of agreed costs. Leave to proceed but suspended so long as Defendant pays £10 on 20 January 1947 and £10 on 20 th of each subsequent month.	

JUDGES NOTENOTEBOOK NO 71
File No. J114/34 Sir Walker Carter Q.C. 1954-64

Date	Case Name	Page
25/03/54	W & F Doughty Ltd v Earl	1
25/06/54	Nixon v Harris & Partners	2
15/11/54	A C Boyes & Sons Ltd v Temple	14
17/11/54	Towgood v Rawlingson & Webber	15
24/11/54	Bristol Steam Oven Works Ltd v Reffell (Patterson Third Party)	25
23/01/56	Doling v Doling	38
28/03/57	E C Dawes v Trusson	43
06/05/57	Sun Papermill Co Limited v All Purpose Building Co Ltd Third Party – Brock Roofing Contractors Ltd	54
08/05/57	Horsmonden Trust Ltd v Lambert & Squires	55
16/05/57	Eastern Distributors Ltd v Jackson	57
16/05/57	Harcourt Investment & Finance Ltd v Jackson	59
14/10/57	Kirra Silks Ltd v Rares	61
28/10/57	Bowmaker Ltd v Wareham Boreclay Co	62
05/11/57	Brown v Moore	63
21/01/58	H Fairweather & Co Ltd v Appointed Props Ltd	68
27/01/58	Newman & Watson Ltd v Robson	69
03/02/58	Adkins v Joseph Kaid & Co Ltd	81
05/02/58	Hobbs Wilson Ltd v Zviran	88
20/02/58	Baillie & Anor v Lewis & Anor and Bailie & Anor v J Pointing & Son Ltd (consolidated action)	105
24/02/58	Gardener & Anor v Northam	108
26/02/58	M A Stern (Shopfitters Ltd) v Birnie	110
11/03/58	Harry Phipps Ltd v Kirmin Ltd	124
16/02/59	Corporation of the City of London v Nadine	144
03/03/59	Signal & Duncan Ltd v Ellison	150
09/03/59	V French Ltd v Spurrell	158
11/03/58	Church Commissioners v Hopkins Property Co Ltd	161
18/03/59	Chipps-Smith v Tuck & Anor	162
20/04/59	S Kaplin & Son Ltd v Parkins	164
06/05/59	French v Kingwood Hill Ltd	167
05/03/62	Berger Janson & Nicholson Ltd v Ministry of Works	172
04/04/62	L V Purchasing Co Ltd v Jacob Bros	199
07/05/62	Bernard v Britz Bros Ltd	209
17/12/62	United Retaining Services Ltd v J G Powell & Son Ltd	231
18/12/62	Waddell v Mainrows	232
20/12/62	Shopfitting Centre Ltd v Revette	236
14/01/63	C H Bailey Ltd v Cebuille Ltd	239
19/11/64	Hancon Finance Co Ltd v Currin Spagel	261
23/11/64	Saunders v Fainer	263

JUDGES NOTENOTEBOOK NO 71

J114/34

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/34	SH101296	25/03/54	W & F Doughty Ltd v Earl	Action immediately settled, settlement order issued by Referee.	
J114/34	SH101296	25/06/54	Jackson v Harris & Partners Ltd	Building works undertaken by way of foundations to bay. Cracking in bay. Cracks increased slowly then rapidly. Repairs undertaken but cement and sand friable. Cracks appeared in precisely same place as before. Expert found very poor concrete. Mix of concrete seems to be at fault. Property might still have subsided but not so much because of the bad mix concrete. Contrary evidence given that concrete was adequate for load and same damage would have happened even if it had been first class concrete. Expert evidence given that reinforced raft was holding up the bay preventing it from cracking. Judge awarded £116.5s.3d on claim. (These cases are now becoming more complex, matters of engineering design, quality of concrete, more highly specialist expert evidence admitted).	
J114/34	SH101301	17/11/54	Towgood v Rawlinson & Webber	Builder worked for Defendants on 10 or 20 houses at time. Payment of monies owed to builder, builder stopped work, some of work was war damage work. Question	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				of oral instructions for war damage work. Clients not able to pay for repairs other than war damage. 32 contracts involved according to Claimant's submissions, one for external works, one for internal works on eaCh Judge awarded £1,585.8s.3d in judgment for Plaintiffs.	
J114/34	SH101306	24/11/54	Bristol Steam Oven Works Ltd v Ruffell & Patterson as third party	Oven used by baker in Maidenhead. The working life of the oven should be 20 years. Coke oven converted to gas firing. Owner paid Jones for work, Pattersons mend did job. First it took baker 45 mins to bake two baps then took more than 60 mins. Crack appeared in brickwork, effessence in oven. Baker suffered fall in sales. Sales of bread fell 10% between December 49 and June 50, steam coming out of oven. Problem was brick structure and combustion chamber and air supply. Florescence was described as expert as most serious he had ever met. Fourth day Judge gave judgment for £305.5s.10d judgment on Counterclaim for £200. There was no payment in, no letter making any offer. Third party proceedings adjourned. Judgment for Plaintiff £305.5s.10d, list of documents ordered. Inspection. Composite bundle ordered. Three days hearing payment into Court Plaintiffs awarded 58ths of costs.	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/34	SH101313	25/01/56	Russell & Ors v Shaw	Landlord and Tenant – dilapidations claim. No Judgment noted.	
J114/34	SH101315	28/03/57	E C Dawes & Co Ltd v Trusson	Building contract. Dispute with builder over 4 steps instead of 1 step, his wife could notfrom the house. Question as to rights of way and building of ramp; position of garage. Lump sum contract issue of repudiation arising. Judgment for £350, £150 on counterclaim.	Preliminary issues did Defendant tell Plaintiffs to build a runway without steps from kitchen door? Was there an implied term?
J114/34	SH101317	06/05/57	Sun Papermill Co Ltd v All Purpose Building Co Ltd Third party Brock Roofing Contractors Ltd	Judgment by consent for Plaintiff for £120 Judgment for Defendant against third party for £70; order for payment out of £190.18s.11d to Plaintiffs Solicitors without further authority.	
J114/34	SH101318	08/05/57	Horsmond Trust Ltd v Lambert & Symes (a firm)	Plaintiff asked Defendant to give Plaintiff valuation on property at Court Lodge; Defendant valued house at £5,500, Plaintiff bought house for £6,300 or £6,200 but floor of lounge curled out, surveyor had only noticed small area of woodworm. No agreement on fees. Plaintiff said that if he had known of dry rot he would have sought advice and never bought house. Expert gave evidence as to widespread infestation in ceiling joists and rafter and in plaster laths. This was perfectly visible. Beetle infestation in mantelpiece in dining room. Five other areas of infestation noticed. Central heating defective. Judgment	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				£500.	
J114/34	SH101320	16/05/57	Eastern Distributors Ltd v Jackson	<p>Referee gave directions for leave to amend, gave Judgment for Plaintiff for £670 costs and application for time to pay under Order 42 Rule 19; adjourned hearing of action Harcourt v Jackson. Ordered Affidavit in support to be delivered in 14 days.</p> <p>(These cases certainly getting more complex both technically and procedurally. Judges certainly hearing more detailed evidence)</p>	<p>Application adjourned on terms; Plaintiff to have leave to amend Statement of Claim within 7 days by claiming rectification of recourse agreement; Plaintiff agreeing not to enforce their judgment against Defendant until judgment given in separate action. Two columns to be added to Scott Schedule as to amounts received. Plaintiff to give particulars on amounts received direct from insurers up to date of reissue of the writ. Possiblere served trial not before first day of action.</p>
J114/34	SH101321	14/10/57	Kirra Silks Ltd v Rares	Judgment by consent for the Plaintiff for £625 £350 in Court to be paid out in part satisfaction. Stay of execution provided £150 paid by 14 November and £125 paid by 14 December.	
J114/34	SH101321	28/10/57	Bowmakers (Plant) Ltd v Wareham Ball Cleaning Company	Judgment for £1,650 with costs to be taxed or agreed. Counterclaim dismissed with costs. £1,600 paid out to Plaintiffs.	
J114/34	SH101322	05/11/57	Brown (T/a Brown-Long) v Moore Spinster	Building contract. Bill of Quantities. Question	Preliminary issue of fact and

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
			pursuant to Order dated 18 July 1957	over instructions. Issue over certificate. First reference is noted to Keating and Hudson. Case references to Sharp v San Paolo Railway and the Moorcock. Issue of estoppel arising. Judgement for Defendant under issue. (For the first time both Keating and Hudson are referred to in a case, cases are clearly becoming more complex now dealing with issues of law and not just simply issues of fact: Note: it is really about this time the Referees become more like High Court Judges than simply Referees. Burrows Article 1940 was somewhat premature – see findings Chapter 7.	law raised in paragraphs 4, 11, 12, 13, 14 of Reply and Defence to Counterclaim be tried before all other issues in this action.
J114/34	SH101324		H Fairweather & Co Ltd v Pointed Properties Ltd and David Lee	Issues of bad workmanship and delay. Judgment for £275 order for payment out of money in Court paid to Plaintiff's solicitors without further order. Amount of costs to be taxed. Judgment for on claim without costs.	
J114/34	SH101325	27/01/58	Newman & Watson v Robson	Gardener Defendant began installation of plumbing works in house, pipe work did not follow what was agreed. Pipes froze up because of location. Other building defects. Judgment given but no note in Judge's noteNotebook (trial lasted 4 days).	
J114/34	SH101328	03/02/58	Adkins v Joseph Kaid & Co Ltd	Contract for works in basement. Architect prepared drawings for variations to basement works. Fixed price on specification. Contract	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				for £656. Final bill was £789.13s.11d. Fixed price contract plus extras. Scheme was changed four times. Order for payment out for £350 to Plaintiff's Solicitors without further authority. Order for Defendant to pay to Plaintiff's costs of claim and counterclaim up to 17.1.58, order for Plaintiff to pay Defendant's costs of claim and counterclaim from 17/1/58 set up of one set of costs against the other execution for balance only. No costs of the amendment.	
J114/34	SH101330	05/02/58	M Hobbs Wilson Ltd v Zwvin	Defective central heating system. Trouble with flue. Chimney fell off boiler. Boiler was badly installed. Did not exceed 150 degrees flow temperature. Plaintiffs repudiated contract by putting in too small a boiler. Suggested that Defendant should not have taken expert advice until Writ issued! No judgment noted.	
J114/34	SH101335	20/02/58	Baillie & Anor v Lewis & Anor and Baillie & Anor v J Pointing & Son Ltd Consolidated actions	Sale of freehold property, issues of income tax, Baillie owe £1,700 by company. Alterations made by property. Issue over income tax on loan. Judge held Defendants to pay Plaintiffs £900 each party pay their own costs, companies action stay of all proceedings.	
J114/34	SH101336	26/02/58	M A Stern (Shop fitters ltd) V Birnie	Building contract works. Claim for omissions, extras delay and bad workmanship. Fire risk from boiler, lack of ventilation, no	Judgment had site visit.

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				judgment in noteNotebook.	
J114/34	SH101342	11/03/58	Harry Phipps Ltd v Karnis Ltd	Question as to whether there was market value, evidence that there was no market if no market value therefore cost price. Question of diced carrots and packaging per Ralph Gibson in case "the modern practice is to have a label so designed that no matter how you stock it the housewife will be able to recognise the style of goods contained within it". Judge went also to consider packaging of prunes and apricots, goods not overpriced. Judge gave judgment for Plaintiffs for £580.16s costs up to and including the hearing on 11 March 1959. No costs thereafter.	Preliminary issue "the issue concerning the actual value of the stock in trade be tried after all other issues in the action". Order 20/12/57 W K Carter QC
J114/34	SH101347	16/2/59	The Mayor and Commentary and Citizens of London v Ndiwe	Rundown defective premises extremely poor condition. Statutory notices served in April 1957, claim for damages andprofits but no judgment.	
J114/34	SH101348	03/03/59	Syme & Duncan Ltd v Ellison	Claim for £80 odd work not done and damages for delay. Estimate given in November 1954, work started in November 1955, work finished in August 1956.	
J114/34	SH101350	09/03/59	V French Ltd v Spurrell	Claim for £1,668.9s.9d. building works questions of reasonable price, extra works, delay further claim under War Damage Act, compensation issues. Judgment for £1,450, £700 in Court in part satisfaction, stay of execution to 1/7/59.	
J114/34	SH101352	11/3/59	Church Commissioners	Removal of stay	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
			for England v Hoskins Property Co Ltd	forthwith, damages assessed at £1,000, Defendants to pay costs of action.	
J114/34	SH101352	18/03/59	Chippis Smith v Tuck & Frank N Bateman	Work carried out to house, issue as to extras, surveyor instructing the same. Fair and reasonable price. Judgment for Plaintiff against Defendant £550 with costs judgment for Defendant Frank & Bateman Ltd v Plaintiff First Defendant to pay Second Defendant's costs of action.	
J114/34	SH101353	30/04/59	S K Kaplin & Son Ltd (Upholsterers) Ltd v Parkins	Damage to property, injury to reversion, building over 100 years old, trial adjourned generally with liberty to restore. Plaintiff's costs of the action to be taxed and paid within 14 days after taxation.	
J114/34	SH101355	06/05/59	A Martin French v Kingswood Hill Ltd	Trial of preliminary issue, claim for fees in sum of £1,320.12s.8d. Issues of set off argued, Defendant had choice whether or not to rely on his set off and could elect. Question as to what accord and satisfaction meant in this context of whether payment into Court constituted discontinuance of action, whether cause of action survived discontinuance, issue of estoppel. Representation was that Defendants were offering this sum in compromise of entire proceedings? Express selection by Defendants not to rely on equitable set off before judicature acts (trial 3 days)	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
J114/34	SH101357	05/03/62	Berger Jensen & Nicholson Ltd v Ministry of Works	Claim in respect of building works, decorative repair works. Palmers gave expert evidence as to reasonableness of prices. Cleaning of several properties, references to Berkeley Sq House and Buckingham Palace. Kew Museum. Painting works and decorating generally.	Judge had view of premises 7/3/62
J114/34	SH101363	04/04/62	LV Purchasing Co Ltd v Jacob Bros	Question of defective work. Terrazo floor. Installation of boulent pipes was trouble. Raising on terrazzo floor indicating that proper skill and care had not been used according to experts; raising could be caused by old cement, too much water, too quick drying, damages awarded on basis between difference of value of floor as ought to have been and as it was. It was not called questions as to would he replace floor? Some award appears to have been £99 but appears to have been no Judge's note.	
J114/34	SH101366	07/5/62	Nathan Bernard & Brit Bros Ltd and Brit Bros Ltd and Nathan Bernard and Ruth Bernard by counterclaim	Second Court Expert had misunderstood his instructions. No Judgment noted.	8/5/62 second day of trial - note: "Counsel attended His Honour is his room to consent terms of reference and appointment of Court experts. Adjourned on summons until 11 May 62. First experts report July 63.
J114/34	SH101368	19/11/64	Harcon Finance Co Ltd & Armin Spiegel Ltd	Breach of contract. Judgment for Plaintiffs £2,349.4s.2d with	

Archive Reference	Digital Record Reference	Date	Name of Case	Type/Nature	Case flow management element
				costs, costs reserved.	

STATISTICAL DATA SPREADSHEETS

Re-entered on judgement being set-aside	162	311		367	286	234	270	284	282	212
Total cases referred in that year	162	311	507	734	572	468	540	568	564	424
Ending at the end of that particular year as a measure of delay	82	142	226	184	142	119	116	107	119	83

Net number of cases	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928
Year										
Structure of Process										
Total references for trial	210	393	649	593	470	376	389	400	389	331
Ending at end of year	82	142	226	184	142	119	116	107	119	83
Effective disposal of cases: case management	128	251	423	409	328	257	273	293	270	248
Percentage of effective disposal (Similar result to Formula A)	61	64%	65	69	70	68	70	73	69	75

Percentage of effective disposal Nearest 2 decimal places	60.95	64%	65.18	68.97	69.79	68.35	70.18	73.25	69.41	74.92
---	-------	-----	-------	-------	-------	-------	-------	-------	-------	-------

282	241	245	214	211	225	224	250	246
564	482	490	428	422	450	448	500	492
96	98	94	105	112	128	127	126	112

265	4811
530	9656
109	2427

1929	1930	1931	1932	1933	1934	1935	1936	1937
365	336	343	308	316	337	352	377	372
96	98	94	105	112	128	127	126	112
269	238	249	203	204	209	225	251	260
74	71	73	66	65	62	64	67	70

1938	1939	1940	1941	1942	1943	1944	1945
Totals							
377	7683						
109	2427						
268	5256	0	0	0	0	0	0
71	68						

73.70	70.83	72.59	65.91	64.56	62.02	63.92	66.58	69.89
-------	-------	-------	-------	-------	-------	-------	-------	-------

71.09	68.41
-------	-------

1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
	385	617	685	677	724	730	633	657	663	537	449	443	483	440	425	400
	109	202	207	219	223	272	211	207	225	220	169	167	186	199	159	150
	19	22	30	25	31	22	19	18	18	9	10	15	15	12	7	10
	218	261	420	413	434	395	382	408	369	273	235	230	243	208	239	218
		2	1	2		3			1	2	1	2			3	1
	11	24	17	18	36	38	21	24	50	33	34	29	39	21	17	16
	133	258	225	289	293	350	316	307	302	243	182	167	158	154	165	140
	47	118	97	147	123	127	82	100	91	93	66	63	95	107	84	90
	3	23	22	18	36	42	27	25	50	32	34	27	31	20	17	14
	202	218	267	223	272	211	208	225	220	169	167	186	199	159	159	150
	565	1069	1412	1206	1188	1125	1114	1137	1158	871	782	754	918	774	737	600
	247	446	596	546	612	603	599	596	596	520	407	408	360	370	327	300
	30	30	59	11	7	42	25	32	32	22	33	16	22	22	27	20
	277	476	655	557	619	645	624	628	628	542	440	424	382	392	354	300

1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
Eastham																
Trapnell	Trapnell	Trapnell	Trapnell		Caswell											
	Leach	Leach	Leach		Leach	Percy-Lam	Percy-Lam	Percy-Lam								
Samuels	Samuels	Cloutman	Cloutman	Cloutman												
		Hull	Hull											Kelly-Cardé	Kelly-Cardé	Kelly-Cardé
	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
	47.5	64.7	50.2	67.1	62.4	71.1	67.1	65.8	66.8	68.5	62.8	58.0	58.8	63.9	62.6	61.0
	53.6	83.5	48.1	63.1	58.5	76.4	74.9	68.2	68.9	76.7	65.0	60.5	53.2	63.9	62.0	58.0
	34.5	41.8	32.8	42.7	40.5	47.9	49.9	46.7	45.6	45.3	40.5	37.7	32.7	35.0	38.8	35.0
	12.2	19.1	14.1	21.7	16.9	17.3	12.9	15.2	13.7	17.3	14.6	14.2	19.6	24.3	19.8	22.0

Total cases
385

Total cases

1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
	385	617	685	677	724	730	633	657	663	537	449	443	483	440	425	400
	133	258	225	289	293	350	316	307	302	243	182	167	158	154	165	140
	50	141	119	165	159	169	109	125	141	125	100	90	126	127	101	100

1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
	202										167	186	199	159	159	150
		218	267	223	272	211	208	225	220	169	2013					

1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
	385	617	685	677	724	730	633	657	663	537	449	443	483	440	425	400
	133	258	225	289	293	350	316	307	302	243	182	167	158	154	165	140
	47	118	97	147	123	127	82	100	91	93	66	63	95	107	84	90
	3	23	22	18	36	42	27	25	50	32	34	27	31	20	17	14
	183	399	344	454	452	519	425	432	443	368	282	257	284	281	266	250

1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
	19	22	30	25	31	22	19	18	18	9	10	15	15	12	7	10
	218	261	420	413	434	395	382	408	369	273	235	230	243	208	239	218
		2	1	2		3			1	2	1	2			3	1
	11	24	17	18	36	38	21	24	50	33	34	29	39	21	17	16

1962	1963	1964	1965	1966	1967	1968	1969	1970	
407	441	488	546	597	637	685	682	901	13932
159	157	163	214	242	254	260	285	376	5085
13	11	10	15	15	19	21	13	19	408
218	249	284	289	298	330	364	363	474	7597
1	2		3	3	3				29
16	22	31	23	35	30	40	21	32	662
			2	4	2				8
144	72	83	79	78	101	107	63	91	4360
90	183	157	202	220	237	257	220	329	3335
16	23	34	23	45	40	29	23	35	675
157	163	214	242	254	260	292	376	446	5489
664	732	757	800	775	952	1123	952	1223	22788
340	404	355	340	373	418	373	320	385	10541
6	18	9	23	32	33	32	58	15	636
346	422	364	363	405	451	405	378	400	11177

Year

Nature of Process

Total references for trial
 Pending at commencement of year
 Brought in during the year
 Referred by Judge
 Referred by Master
 Arbitration Act 1950
 By transfer
 Re-entered on judgement being set-aside
 Tried
 Withdrawn or otherwise disposed of
 Transferred
 Pending at the end of the year
 Number of summonses and Interlocutory Applications heard during the year
 Number of days spent on Official Referee business London
 Number of days spent on Official Referee business Outside London
 Total number of days spent on Official Referee business

1962	1963	1964	1965	1966	1967	1968	1969	1970
------	------	------	------	------	------	------	------	------

Richards Richards Richards Richards Richards Richards Richards Richards Richards

Stabb Stabb

Percy-Lam Percy-Lam Percy-Lam Percy-Lam Percy-Lam Percy-Lam Percy-Lam Percy-Lam Percy-Lam

Cloutman Cloutman

Kelly-Carte Kelly-Carte Kelly-Carte Kelly-Carte Kelly-Carte Kelly-Carte Kelly-Carte Kelly-Carte Kelly-Carte

1962	1963	1964	1965	1966	1967	1968	1969	1970	Total %	Average %
61.4	63.0	56.1	55.7	57.5	59.3	57.4	44.9	50.5	1443.1	60.1
58.1	25.4	25.5	23.8	22.0	26.3	25.2	15.9	17.3	1216.0	50.7
35.4	16.3	17.0	14.5	13.1	15.9	15.6	9.2	10.1	759.6	31.7
22.1	41.4	32.2	36.9	36.8	37.2	37.5	32.3	36.5	565.7	23.6

Total cases

407	441	488	546	597	637	685	682	901	7624
-----	-----	-----	-----	-----	-----	-----	-----	-----	------

1962	1963	1964	1965	1966	1967	1968	1969	1970
------	------	------	------	------	------	------	------	------

407	441	488	546	597	637	685	682	901
-----	-----	-----	-----	-----	-----	-----	-----	-----

144	72	83	79	78	101	107	63	91
-----	----	----	----	----	-----	-----	----	----

106	206	191	225	265	277	286	243	364
-----	-----	-----	-----	-----	-----	-----	-----	-----

106	206	191	225	265	277	286	243	364	2707
-----	-----	-----	-----	-----	-----	-----	-----	-----	------

1962	1963	1964	1965	1966	1967	1968	1969	1970
------	------	------	------	------	------	------	------	------

157	163	214	242	254	260	292	376	446	3274
-----	-----	-----	-----	-----	-----	-----	-----	-----	------

1962	1963	1964	1965	1966	1967	1968	1969	1970
------	------	------	------	------	------	------	------	------

407	441	488	546	597	637	685	682	901	13932
-----	-----	-----	-----	-----	-----	-----	-----	-----	-------

144	72	83	79	78	101	107	63	91	4360
-----	----	----	----	----	-----	-----	----	----	------

90	183	157	202	220	237	257	220	329	3335
----	-----	-----	-----	-----	-----	-----	-----	-----	------

16	23	34	23	45	40	29	23	35	675
----	----	----	----	----	----	----	----	----	-----

250	278	274	304	343	378	393	306	455	8370
-----	-----	-----	-----	-----	-----	-----	-----	-----	------

1962	1963	1964	1965	1966	1967	1968	1969	1970
------	------	------	------	------	------	------	------	------

13	11	10	15	15	19	21	13	19	408
----	----	----	----	----	----	----	----	----	-----

218	249	284	289	298	330	364	363	474	7597
-----	-----	-----	-----	-----	-----	-----	-----	-----	------

1	2		3	3	3				29
---	---	--	---	---	---	--	--	--	----

16	22	31	23	35	30	40	21	32	662
----	----	----	----	----	----	----	----	----	-----

248	309	468	458	501	458	422	450	438	317	280	276	297	241	266	241
202	218	267	223	272	211	208	225	220	169	167	186	199	159	159	159

1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962
------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------

	385	617	685	677	724	730	633	657	663	537	449	443	483	440	425	407
	202	218	267	223	272	211	208	225	220	169	167	186	199	159	159	159
0	183	399	418	454	452	519	425	432	443	368	282	257	284	281	266	250
	48	65	61	67	62	71	67	66	67	69	63	58	59	64	63	63

47.53	64.67	61.02	67.06	62.43	71.10	67.14	65.75	66.82	68.53	62.81	58.01	58.80	63.86	62.59	61.41
-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------

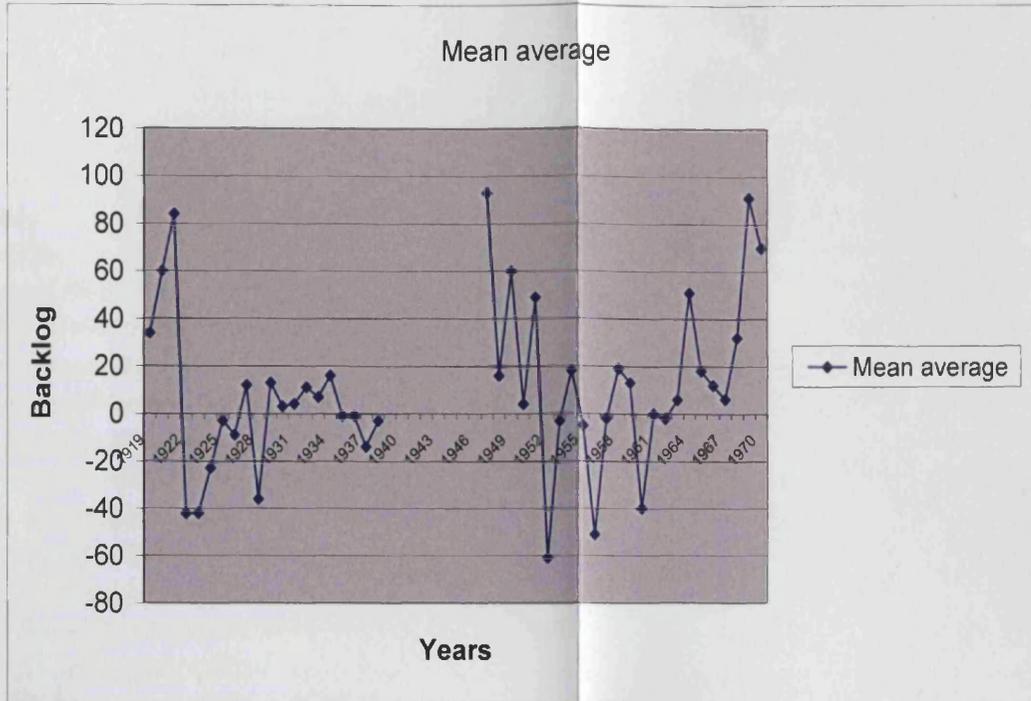
248	284	325	2	4	2				8
157	163	214	332	355	384	425	397	525	
			242	254	260	292	376	446	5489

1962	1963	1964	1965	1966	1967	1968	1969	1970	
407	441	488	546	597	637	685	682	901	13932
157	163	214	242	254	260	292	376	446	5489
250	278	274	304	343	377	393	306	455	8443
61	63	56	56	57	59	57	45	50	61

61.43	63.04	56.15	55.68	57.45	59.18	57.37	44.87	50.50	60.60
-------	-------	-------	-------	-------	-------	-------	-------	-------	-------

1943	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956
				109	202	207	219	223	272	211	207	225	220
				202	218	267	223	272	211	208	225	220	169
				93	16	60	4	49	-61	-3	18	-5	-51

1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970
169	167	186	199	159	159	157	163	214	242	254	260	285	376
167	186	199	159	159	157	163	214	242	254	260	292	376	446
-2	19	13	-40	0	-2	6	51	18	12	6	32	91	70

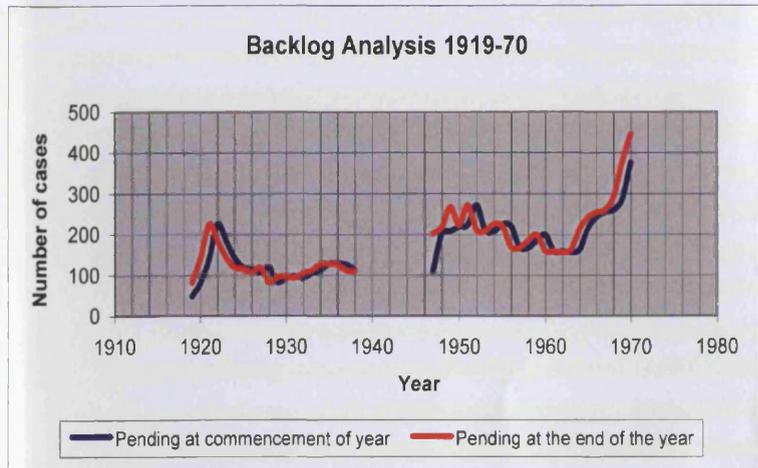


	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928
ing at commencement of year	48	82	142	226	184	142	119	116	107	119
ing at the end of the year	82	142	226	184	142	119	116	107	119	83
n average	34	60	84	-42	-42	-23	-3	-9	12	-36

2=beginning

Line 3 -Line 2= mean

log reduced =- Backlog increased= duced where minus sign, otherwise it increased that year.



Backlog Analysis:1919-37 and 1947-70.

1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
83	95	98	94	105	112	128	127	126	112				
96	98	94	105	112	128	127	126	112	109				
13	3	4	11	7	16	-1	-1	-14	-3				