The Woolf Reforms 10 years on

In 1994 Lord Justice Woolf was appointed by the then Lord Chancellor to review the rules and procedures of the civil courts in England and Wales. The aims of the review were:

- To improve access to justice and reduce the cost of litigation;
- To reduce the complexity of the rules and modernise terminology; and
- To remove unnecessary distinctions of practice and procedure.

Lord Woolf’s recommendations, in his interim and final reports in 1995 and 1996, finally culminated in the introduction of the CPR on 26 April 2009. Ten years on we no longer have separate high court and county court rules, claim forms have replaced writs and statements of case have replaced pleadings, but have the more fundamental aims been achieved?

In December 2008 the Faculty of Law at the University of Oxford held a conference to mark the 10th anniversary of the CPR and consider whether the aims of the reforms had been met. Speakers included Professor Michael Zander QC (an ardent critic of the reforms from the outset), the Master of the Rolls Sir Anthony Clarke, and Herbert Smith partner Tim Parkes, giving the practitioner’s perspective. In preparation for that conference, we canvassed the views of over 30 experienced practitioners (mainly Herbert Smith partners and senior associates) on the issues which were thought to be central to the success or otherwise of the CPR in the context of commercial litigation.

The successes, according to our research, include:

- Swifter timetables
- Increase in mediated settlements
- Part 36 offers
- Reduced interlocutory skirmishing due to summary assessment of costs

The areas where there remains cause for concern include:

- Disclosure, particularly e-disclosure, escalating out of control
- Lack of sufficient informed case management from the judiciary
- Costs overall and the front loading of costs.
These are all, not surprisingly, currently under review: Lord Justice Jackson has been appointed to conduct a fundamental review into the cost of civil litigation and is due to publish his interim report on 8th May 2009. In the commercial court meanwhile there has been a pilot implementing the case management recommendations of the Long Trials Working Party Report of December 2007.

We look at the successes and the areas causing concern in more detail below.

Timetables

One of Lord Woolf's aims was that tighter timetables would be imposed and that cases would come to trial more quickly. That has been our experience in practice in most cases. The timetable will of course depend on the number of documents, witnesses, experts etc but the court is reluctant to postpone a trial without very good reason and cases are not allowed to drift on as could happen under the old system. It has also generally been quicker to obtain a hearing date for interim applications, perhaps because fewer are issued post CPR than before.

ADR

Lord Woolf wanted litigation to be avoided wherever possible and wanted it to be less adversarial and more co-operative. To this end, at case management conferences and pre-trial reviews, the court was to encourage the use of ADR and was to take into account in costs decisions whether the parties had behaved unreasonably.

Have judges become proactive in encouraging the use of ADR? There are some judges who seemed to be "evangelical" about ADR in the early days of the CPR. However, there is a view that this has tailed off somewhat, in part due to the Court of Appeal decision in Halsey v Milton Keynes General NHS Trust. The costs sanctions which can be imposed for failure to mediate are, in some cases, a factor in parties using ADR but are not, in our experience, the deciding factor.

What is apparent though is that ADR in all its forms is now much more on the clients' and the courts' radar post Woolf and is something which is considered in all cases and takes place in many. The question now in many commercial litigation cases has become not whether to mediate but when. ADR is not without its critics, however. Dame Hazel Genn for example spoke out at the end of last year on the danger of ADR being used as an excuse to save public money and divert cases from the court system.

Part 36 offers of settlement

The introduction of Part 36 offers has been one of the most successful rules introduced with the CPR. Overwhelmingly practitioners consider that Part 36 offers encourage settlement. There is debate about whether this is mainly down to the costs consequences of Part 36 offers, or rather the new framework for making offers, which has encouraged parties to initiate settlement approaches without seeming weak. In practice it seems to have become almost standard for claimants and defendants to make Part 36 offers. (Pre-CPR there was a similar mechanism for defendants by means of payments into court but there was no equivalent open to claimants.)

That is not to say, however, that Part 36 is free of criticism. Some consider it too narrow. Non-monetary relief does not comfortably fit into the framework and parties cannot offer anything outside the exact relief pleaded without uncertainty as to whether it would be deemed a Part 36 offer. Another criticism is that courts have eroded Part 36's effectiveness by applying too much discretion, with the result that it can be difficult to advise clients on the ramifications of offers.

One of the options Lord Justice Jackson has been looking at in his review of civil costs is whether there would be any benefit in abolishing the costs shifting rule (whereby the loser pays the winner's costs). In that scenario, Part 36 offers would also presumably fall away, unless a system was introduced providing for costs awards only in the event that an offer was refused and not bettered at trial.

Disclosure

The transformation from discovery (as the process was known pre-CPR) to disclosure incorporated a number of significant changes, including a narrower test for disclosure than for discovery (limited to those documents which support or adversely affect any party's case, as compared to the old "train of enquiry")
test) and a requirement that the parties need make only a reasonable search for documents. Has this resulted in disclosure becoming narrower or more issue-driven in practice? Experiences are very mixed. Approximately half of practitioners consider that, in practice, many parties have continued to give wide-ranging disclosure more akin to old style discovery. The other half believe that disclosure has become narrower and more issue-driven.

This range of views is probably due to the fact that parties are taking a wide range of approaches to disclosure itself. Some parties are effectively using the old test, either because of cost or perhaps, in some cases, out of a desire to "swamp" the opponent with large quantities of only marginally relevant documents. A detailed evaluation of the documents to determine whether they in fact support or adversely affect a party's case can take longer than simply including everything that is broadly relevant. In addition, there are a number of judgment calls to be made by the parties and their lawyers, for example, whether documents that explain the background to, or set the context of, other key documents should be disclosed. Too much disclosure and the party runs the risk, although minimal in practice at present, of being penalised in costs. Too little and the true relevance of key documentation may be lost, and again the party runs the risk of criticism. The involvement of senior lawyers in the disclosure process is therefore increased. A further argument raised is that where focused disclosure is given, the party will almost certainly face an application for specific disclosure, which the courts often allow. This then means the exercise has to be carried out again, in part at least, with all the attendant costs involved as well as potentially diverting attention from the task of evaluating the other party's disclosed documents.

Those who favour the narrow test consider the solution to the differing approaches is for the court to make more use of its powers to impose costs sanctions for disclosure of irrelevant documents. This is the approach taken by the Commercial Court Long Trials Working Party Report, which has suggested that costs sanctions should indeed be imposed if large quantities of irrelevant documents are disclosed. It is also thought that the court should be more involved from the outset in settling the parameters of disclosure. Lord Justice Jackson in his costs review is considering a number of options, including whether a disclosure assessor should be appointed in large cases. Even more radically, he has been consulting on whether practitioners and litigants would favour a system where a party was generally obliged only to produce documents on which it relies and related documents (i.e. not adverse documents). It is thought very unlikely this will meet with general support in commercial cases.

A consistent comment in our research was that the rise of electronic disclosure has greatly outweighed any benefits from the narrowing of disclosure or making it more issue driven. E-disclosure is thought to be the single biggest challenge facing the civil procedure system, at least in commercial cases.

Case management

Effective case management was at the heart of the introduction of the CPR. Ultimate responsibility for the control of litigation was to move from the parties and their legal advisers to the court. Practitioners report that judges and masters are conscious that they are supposed to be proactive, and some are, but the overall impression is that increased judicial case management relating to defining issues, monitoring costs and settlement discussions (as opposed to timetabling) has not happened anywhere near to the extent envisaged by Lord Woolf. This may not be unexpected. There was already a certain amount of case management in some courts, such as the commercial court, and so judges in these courts have not felt the need to intervene further. Also, where the courts are dealing with sophisticated parties, it is felt that judges generally seem happy to let the parties get on with it and so are not particularly interventionist. A large part of the reason, however, has been the difficulty in finding sufficient time in the judiciary's already very full schedules for them to prepare fully in complex, document-heavy cases.

Summary assessment of costs

Lord Woolf wanted the courts to use their powers over costs to encourage cooperative conduct on the part of litigants and to discourage unreasonable conduct. In order to curtail the tendency of some parties to make numerous interlocutory applications, which were generally of a tactical nature, summary assessment of costs was introduced (even before the main body of the reforms) for hearings of a day or less. This "pay as you go" principle has had a major impact. Practitioners report that having costs summarily awarded has meant they
have seen far fewer purely tactical applications or ones with little chance of success. However, there are practical concerns over the process: there is inconsistency between orders made by different judges, leading to uncertainty. The view is that courts (especially where the judge is a former barrister) do not have a real feel for costs and how much time it is necessary to spend preparing for an application. Assessment is felt to be rough and ready with figures being plucked from the air and costs being marked down in the majority of cases. Another issue is that Case Management Conferences (CMCs) in large cases are being used for tactical applications which would not otherwise be brought, because the usual costs order in a CMC is "costs in the case". This is eroding the impact of summary assessment, and is an area that the courts will need to keep under review.

It will also be interesting to see how Lord Justice Jackson deals with summary assessment in his interim report. One of the options he has been consulting on is the removal of summary assessment and its replacement with interim payments on account followed by detailed assessment. Practitioners, however, in our experience generally favour keeping summary assessment but improving on its shortcomings.

**Costs**

One of Lord Woolf's aims was to reduce the costs of litigation. Overwhelmingly, however, it is felt that costs are significantly higher. Whilst case management by the judiciary has not increased to the extent envisaged by Lord Woolf, the obligations placed on the parties by the rules can be onerous and expensive (for example, the process of drafting and trying to agree the list of issues in the commercial court). There has also been an exponential increase in disclosure caused by the number of electronic documents. A further concern is the front loading of costs through compliance with pre-action protocols (which received a mixed press in our survey). Lord Woolf anticipated that costs would increase in the early stages of an action but thought costs overall would be reduced because cases would settle earlier. There is little evidence that this has been the case in large commercial litigation. Concern over costs is of course what has led to Lord Justice Jackson's review. His terms of reference include establishing the effect case management procedures have on costs and considering whether changes in process and/or procedure could bring about more proportionate costs. Radical solutions such as contingency fees and the removal of costs shifting are also on the agenda.

**The Future**

The Woolf reforms have had their successes but significant aims (notably in relation to costs and case management) have not been achieved, so more recently we have seen new initiatives such as the Commercial Court Working Party pilot and Lord Justice Jackson's review. The challenge for Lord Justice Jackson will be to suggest changes which address the high costs of litigation but without jeopardising the ability of the courts to assess the evidence and arrive at the just result, thereby maintaining England and Wales as a jurisdiction of choice in international disputes. We await his interim report with interest.

Interestingly, the 10 year anniversary of the CPR coincided with the introduction of the Civil Justice Reform (CJR) in Hong Kong on 2 April 2009. This followed a review of the CPR which led to the adoption of what were regarded as the beneficial reforms of the CPR such as tighter timetables, encouragement of ADR, Part 36 offers and summary assessment of costs, whilst seeking to mitigate against the front loading of costs by not prescribing pre-action protocols in all cases. For more information on the CJR please click here.

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1 - We also received some input from members of the Commercial Litigators' Forum (an industry group which has as members a high proportion of law firms based in London with commercial litigation work).

2 - [2004] EWCA Civ 576. In that decision, the Court of Appeal concluded that the court has no jurisdiction to force the parties to mediate, relying on Article 6 of the European Convention on
Human Rights. It added that, even if it was wrong on that point, it was difficult to conceive of circumstances in which it would be appropriate to exercise such a jurisdiction.

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