And another thing ...

Richard Harrison sounds off

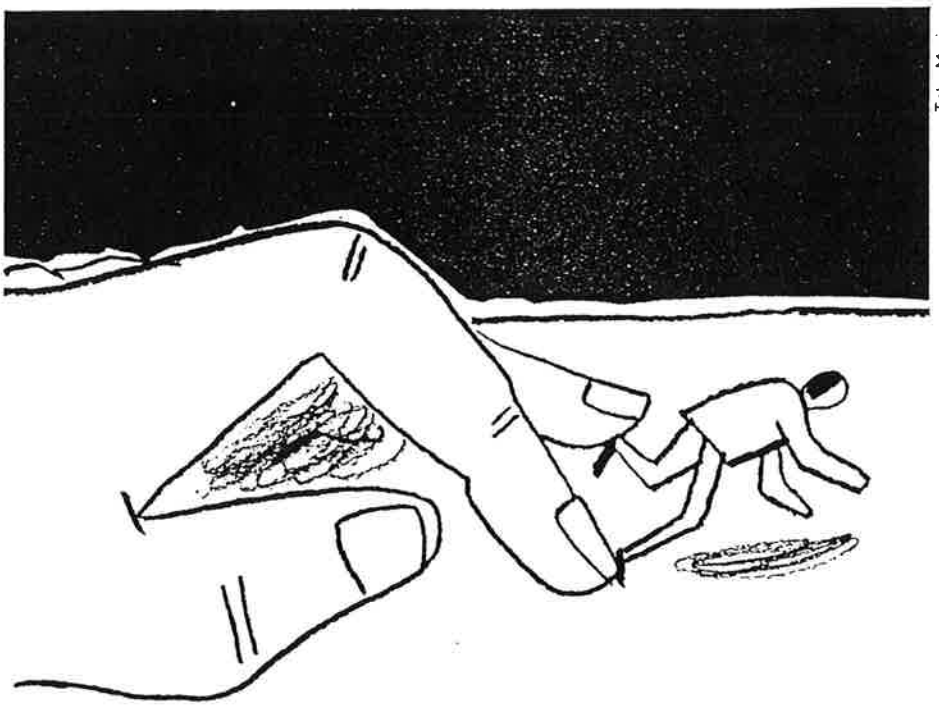
I've finally come up with an explanation for the jaundiced attitude to the recent civil procedure revolution which, before political correctness reasserts itself, I sometimes display in print and in cyberspace. I know it's not Luddism and I've never been a reactionary in professional matters. We can all benefit from changing assumptions and I know that my firm's litigation team are more than capable of meeting the challenge of reform.

So why does my reaction to every official pronouncement on matters Woolfian verge on the psychotic? Why, as I open one of our many versions of the new rules and practice directions in order to implement a step in a matter, do I need to prevent myself gibbering?

Familiar comforts

However unsatisfactory many elements of the old rules were, you could both know them and criticise them. You could explain to clients that the system was flawed, outdated, but we simply had to work within its constraints. There were archaic procedures, clothed in quaint language but they had the patina of history (if only, like the Law Courts in the Strand, dating back to the 1870s). You knew the drawbacks but you developed the experience, the mindset and the shortcuts to cope.

Any success was a badge of fortitude more than anything else but there was also a sense of achievement. This came from hard-earned familiarity with procedures which had been honed and cherished by generations of pedants over the decades and which had a certain perverse charm. You were steeped in the language and concepts of tradition: of plaintiffs, pleadings, leave, *ex parte, inter partes*, interlocutory, in chambers and writs of summons. You fought clients' commercial battles in, around and in spite of them but they tripped off the tongue delightfully. Acquaintance with them denoted hard won experience, from the days of being an articled clerk in the bear garden onwards. You kept your cards off the table, you never admitted anything, you reserved all your rights and you certainly exploited any advantages of procedure and resource which fell to your client.



Toby Morison

Come the revolution ...

You recognised that it was flawed and you looked forward to reform. And reform, when it came, would sweep away the ridiculous, ancient trappings of the *ancien regime* and outlaw the tired posturing of the human participants. You could always dream and plan, and conceive your perfect imagined system—with manageable rules written in plain English, intelligible forms and reasonable people managing the whole thing.

Irritations ...

And now we've finally managed to get a new system which has so much to commend it and so much potential. The concept and much of its implementation has been beyond criticism. It's improved matters in so many ways. I welcome it but: *it's still so annoying*. The carping, sanctions-based philosophy. The notion that judges know best about commercial decision making and resource allocation. The idea that the incompetence of practitioners causes most of the problems of cost and delay. The myth that the case management techniques of the Commercial Court, the Court of Appeal and the House of Lords will work in the trenches of the county courts and the Queen's Bench Division. The hasty, hysterical introduction of constantly amended and Byzantine practice directions. Fast track fixed costs. The sense that some judges and administrators have just returned from an evangelical meeting.

It's still so annoying and the reforms have now come and gone. Yet the litigation world, with all its faults, still turns on its axis. Only now, it's more costly and it's produced the potential for even worse conflicts of interest between solicitors and the judicial administration; between solicitors and clients.

To explain why it's still annoying, I produce two examples.

Why can't parties be trusted to agree a reasonable timetable between themselves?

The first example is taken from the provision regulating the period for filing a defence. This is the most pressurised time when one is acting for a defendant. Proper compliance with pre-action protocols may, in fact, give one greater notice of a claimant's intentions but I suspect that in practice defendants may

still have problems.

The previous time limit of 14 days was always recognised to be unrealistic in a case of any complexity and was, no doubt, designed when the input and comments of only one person, "the client", was needed. Now, of course, sources of information and comment are far more wide ranging and need to be properly co-ordinated. Under the pre-CPR system, longer extensions were generally agreed, practitioners were not unreasonable to do so and such agreements were never the major cause of the delay which the Woolf Reports identified as an evil of the system.

Yet, equating briskness and justice, r 15.5 states:

"The defendant and the claimant may agree that the period for filing a defence specified in r 15.4 shall be extended by up to 28 days"

The provision impliedly prevents the parties agreeing any longer extension without the permission of the Court and this is confirmed by the editors of the *White Book*. They also state that *"Time limits are tight but realistic under the CPR ..."*.

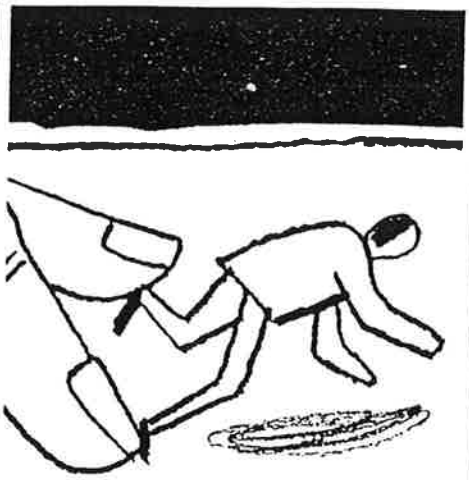
The evil of delay can be addressed by making the court responsive to, and considerate of, one party's legitimate desires to prevent abuse. When two commercial parties, for their own legitimate purposes, wish to extend time, it is not inconsistent with the overriding objective to let them do it. "Case management" is not an end in itself yet the effect of provisions like this is to make reasonable litigants feel like recalcitrant schoolchildren.

Given that multi-track "case management" is not in fact going to be a reality, since the Courts will no doubt expect the parties to agree timetables for post-statement of case directions between themselves, it is simply annoying that we have to face this sort of attitude which will not help reform a thing.

Why do the costs judges appear so grudging about electronic communications?

The second example arises in the area of costs (an area which inspires apoplexy at the best of times) and is focused on the Practice Direction relating to Part 43, para 2.15 (2). Here goes:

"E-mails received or sent by solicitors will not normally be allowed, but the court may, in its discretion, allow an actual time charge for preparation of e-mails sent by solicitors which properly amount to attendances provided that the time taken has been recorded. The court may also, in its discretion, allow a sum in respect of e-mails sent to the client or others where it is satisfied that, had e-mails not been sent, the number of communications which it would have been reasonable to allow would have been substantially greater than the number actually claimed".



"What riles me is the grudging, punitive tone which continues to pervade all official pronouncements on the subject of costs. I have always felt that the system of assessing costs by the item, however time honoured it is, does not really reflect the nature of what legal advice involves. The costs assessment system would be recognised by Dickens and he would not have pulled his punches."

Read it again, take a deep breath and have a long drink. I feel that the real potential for reform has been warped by history and tradition.

What am I saying here? Clearly the aim is to let you recover the costs of e-mail provided that you record the time spent on them and they fulfil the criteria used for allowing all other costs. You just won't be able to count off e-mails and charge them by the six minute unit like you do with short letters and phone calls. In that sense, surely, the draftsman is conservative but eminently reasonable.

The courts are allowing solicitors to do what modern businesses are increasingly doing: using electronic communication as a business tool.

What riles me is the grudging, punitive tone which continues to pervade all official pronouncements on the subject of costs. I have always felt that the system of assessing costs by the item, however time honoured it is, does not really reflect the nature of what legal advice involves. Whilst it may have improved recently, the costs assessment system would be recognised by Dickens and he would not have pulled his punches. It would have been nice to get rid of it but it's obviously not going.

Although there's now more concentration on the wrap up "presentation" item, costs assessment still concentrates on the mechanistic world of "perusals" and "attendances". In any complex case, what we do cannot easily be divided between items: work in advancing a client's interests involves thought, analysis, reflection and drafting, often on a computer screen. Preparing a written summary to form the basis of a negotiation with the other side or to help a client conduct a cost benefit analysis of what to do next straddles all the costs categories. Much valuable work is intangible.

I would have liked the costs assessment system to start to address some of these issues. Yet all it has done is spent time in producing something which attempts to make an increasingly used modern method of computer-based communication less attractive and to find a way to make costs recovery more complex and technical.

These are both examples of my main thesis on all of this which is that the real aim of the civil procedure reforms is to gratify the administrators of the system, not its users.

Even after the April 26 watershed, we find ourselves in a conflict with a legal establishment with an anti-lawyer agenda which will turn out to be an anti-client agenda (will Mr Vaz be better than Mr Hoon? we wait to see). We face potential battles with activist judges fresh from the road to Damascus and we face disgruntled and disillusioned clients asked to pay more for indifferent attention from an overworked court. We've had the reform we deserve so we've just got to make the best of things.

And, sorry guv' I'm on my way home now. o

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