The state of the revolution ...

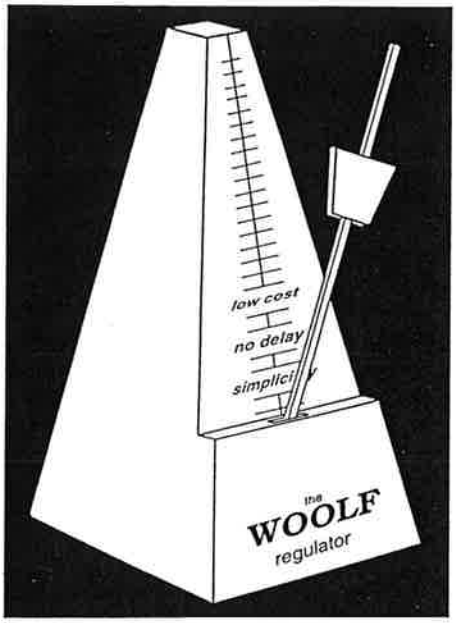
Richard Harrison looks at life under the Civil Procedure Rules

One year on and it seems that most practitioners and most courts are coping with the new rules admirably. Are the reforms generally fulfilling their aims? The Courts have vast new powers to impose discipline on those engaged in objectionable practices. No one can delay a task, obfuscate an issue or be disproportionately without the risk of incurring a wide range of very effective sanctions. "Part 36 Offers" are being made and accepted. Unarguable points are being struck out; weak issues are being dropped. Everyone is more conscious of the costs implications of what they are doing. Lawyers are using the language of co-operation and referring to the culture of the overriding objective to advance their clients' interests: sometimes you wonder if they really mean it.

One aim was to let the courts operate more "efficiently" by making it easier for administrators and judges to do their job of processing cases. If necessary, this is done by removing cases from the system. This has quite clearly been a roaring success. The other aim, more important but more difficult, was to provide greater "access to justice" in a user friendly system. That system would be predictable both in terms of costs and in terms of time-scale and both expense and delay would be reduced. In many cases this has happened and it is a credit to the reforms and those who conceived and implemented them. But there can be no doubt that there are other cases where problems have occurred. Nothing can be perfect from the outset. Change, as we all should know, is not easy but there are certainly clients and practitioners who have experienced frustration and increased expense.

"Administration-centric case management"

The potential for injustice and dissatisfaction amongst customers of the system arises from the wide discretionary case management powers. By their very nature, these powers can make life unpredictable and costly. There are already divergences in practice between specialist courts. Savagely penal procedural orders have been



made. These have succeeded in getting cases out of the system but, on another level, they have only passed the problem on to someone else.

The main problem with the new system, and it is one which requires review and understanding by those in positions of influence, is a misconception of the virtues of "case management". As with much in life, it all depends on how where you stand and how you look at things. Simply because a court administrator sees cases being processed brusquely, efficiently and driven away from the system does not mean that the parties are enjoying "access to justice". This view of the process can be called "administration-centric case management".

A major source of increased cost and frustration comes from courts' inflexibility in allowing parties to agree deadlines or, to some extent, manage cases themselves. That may sound like heresy but it is not a view which is inconsistent with overall support of the reforms. Immense difficulties arise from the assumption that most problems in litigation arise from the misbehaviour of solicitors and, as long as they are kept on their toes, all will be well. If this misconception goes, we will have more enlightened case managers.

The faults of the old system were never really caused by commercial parties agreeing timetables to their own convenience as they attempted to settle cases and allocate resources in a commercial manner. What is always needed is strict control and predictable response from the courts when one of the parties feels that the other party is not negotiating in good faith or is genuinely dragging their feet. But once the court starts imposing case management against the wishes of both parties, the parties are forced to devote resources in excess of what is proportionate. And increased activity has an adverse effect on other court users. The courts should support the parties, not force them into premature expense.

Changes on the horizon

There are various other problems for review: for instance, the benefits of encouraging single joint experts. The effect of the Human Rights Act 1998 on the sanctions driven culture which the Civil Procedure Rules have made available to courts is something which will need to bear increased examination after October[1]. Imminent changes to the appeal system and the messy introduction of new conditional fees regulations and rules relating to the recoverability of costs and insurance premiums have scope for causing real problems shortly.

Two particular issues

For the present, as we approach the anniversary of the reforms, I identify two particular issues which are causing concern.

Transitional provisions: the dreaded post April 25 stay

The first in fact illustrates my general point relating to case management. As all litigation solicitors should be aware by now, April 25, 2000 is a guillotine date. Following that date, any existing proceedings which have not come before a judge (at a hearing or on paper) since April 26, 1999 will be stayed. Whilst any

[1] *See article by Professor Gearty in the Law Society's* Inside Track *for March 2000: "Legal historians will look with surprise at the parallel implementation of two such revolutionary reforms without apparent awareness on the part of proponents of either change that there was likely to be any cross-over or tension between the two."*

party to those proceedings may apply for the stay to be lifted, one senses that this will be an uphill struggle.

This is a beneficial provision but it could be undermined by the "administration-centric case management" to which I have referred above. From the perspective of judges and administrators, the more cases which are thrown out of the system the better. Therefore, there is a misguided notion that it is beneficial to drive cases out of the system and make it as difficult as possible for parties to agree ways in which they can avoid the compulsory stay and revive the case if necessary without bothering themselves with premature and distracting case management activity.

I appreciate that it is very rare that, say, a defendant in a dormant case, would gree a further stay. However, I personally am aware of a number of cases where for delicate commercial reasons (which genuinely need not concern the court) the parties have every interest in keeping the proceedings alive as a background to their negotiations. Those negotiations are between equal commercial parties and will eventually bear fruit. However, "active" case management helps neither party, prejudices both parties and causes increased expense and stress on the participants.

There various directions and official notices floating about[2] which suggest that the court will not act as a rubber stamp and before a case can be said to come before a judge, the courts require a detailed timetable and case management proposals. If read carefully, the spirit of these notes is reasonably sympathetic to the needs of litigants. However, I have some apprehension that there will be courts which take an unnecessarily robust view on this topic. With respect to all those involved, a strict case management attitude is unhelpful and once again will simply cause an increased number of appeals, conflict between solicitors and clients and a general congestion in the courts. If parties agree to maintain the status quo in a dormant case, they should be free to do so with as little expense as possible involved in explaining to the courts what is happening. Judges have better things to do.

The rule making process: constant amendment

My final point is even more fundamental. The forest of rules and regulations is growing back thicker than ever. In chapter 20 of the final *Access to Justice* report of Lord Woolf, there a number of specific objectives set for the rule making exercise, including:

- to identify the core propositions in the rules and to cut down the number of interconnecting provisions which are used;
- reduce the size of the rules and the number of propositions contained in them;
- to remove verbiage and to adopt a simpler and plainer style of drafting.

Lord Woolf specifically stated that rules of court were not an instruction manual for operating a piece of machinery. Ultimately, their purpose is to guide the court and litigants towards the just resolution of the case.

Lord Woolf stressed the potential virtues of changes of terminology in order to make the system comprehensible to "ordinary people of average ability who are unlikely to have more than a single encounter with the system". Some may of course think that the replacement of "writ" with "claim", "leave" with "permission" and "pleading" with "statement of case" is not particularly helpful here, and it is certainly true that new jargon has been appearing, not least references to "Part 36 offers", "Part 8 proceedings" and the like are just as obfuscatory as the old rules.

But of more concern, and it is something which all involved in the system must be keeping in mind, is the constant process of revision by accretion. There are amendments of the rules and practice directions emerging every month or so. This body of material (including, no doubt, detailed commentary and case references), will, in a very short time, be much longer and much more complex than the old rules of the Supreme Court and County Court rules combined.

The rules were introduced quickly, for good reason, and there is an obvious need for amendment because of understandable errors. However, the process of legislation by piecemeal practice directions can cause immense problems. One thing struck me by way of example as I was looking through the latest batch. It is minor but symptomatic. The practice direction to part 2B "Allocation of cases to levels of the judiciary" has had the following paragraphs added:

"Where both the Circuit Judge and the District Judge have jurisdiction in respect of any proceedings, the exercise of jurisdiction by the District Judge is subject to any arrangements made by the Designated Civil Judge for the proper distribution of business between Circuit Judges and District Judges.

"In District Registries of the High Court and in the County Court the designated civil judge may make arrangements for proceedings to be assigned to individual district judges. He may vary such arrangements generally or in particular cases.

"The fact that a case has been assigned to a particular District Judge does not prevent another District Judge from dealing with the case if the circumstances require".

Great stuff but do we really need it? Surely the inherent flexible jurisdiction of the court could have achieved this and no-one would have complained but the point no doubt came up somehow and it was decided to clarify the position to assist administration centric case management. This will happen time and time again, until eventually we will have drafting which is as turgid, cross-referential and impenetrable as the old rules. And, I have it on good authority. If you really love complexity, wait until you see the Civil Procedure (Amendment Number 3) Rules 2000 due to come into force on May 2 to deal with recovery of additional liabilities under conditional fee agreements.

Conclusion

Users may not be seeing the same picture of the reformed system as its planners and administrators. The reality may be a brusque, rough-and-ready procedural justice, driven by sanctions and unreviewable case management decisions. The main way to cope at present is to throw money into the earlier stages of litigation so as to be prepared for every eventuality.

A pragmatic approach now involves detailed project planning and telling clients that it is probably best to front-load their expenditure on every dispute resolution project. It involves a potentially harsh cost-benefit analysis. Not surprisingly, competent lawyers who educate their clients properly may see those clients looking for alternatives. Equally, those newly educated clients who have decided to commit resources where they properly belong may find they are well placed to take full advantage of the streamlined new procedures.

It is far too simplistic to assert that we now have increased access to quicker, cheaper justice when life is more complex than that. The reformed system has its good and bad points: the key is to be able to identify them and draw on the required financial and human resources at the right time. This is not an easy process but it is vital that litigants, private and commercial, continue to recognise and manage the new reality. o

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[2] *I refer once again to Laurie West-Knights' inestimably helpful web site* (http://www.lawonline.cc) *for details and commentary.*