

Law Society Civil Litigation Autumn Conference

20 Years of the Civil Procedure Rules

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Introduction

1. The 20th anniversary of the Civil Procedure Rules has arrived. I well remember the Woolf Report, the processes that led up to it and the reactions at the time. I have to say that I have long been a sympathetic critic of the Woolf reforms. Now that I am the Editor-in-Chief of the White Book, I might be entitled to say something about why I have taken that view.
2. This afternoon, I would also like to offer a new perspective 20 years on.
3. Let me say at once that I do not, in any sense, detract from the enthusiasm and audacity with which Lord Woolf approached the design of the new Civil Procedure Rules. History has, however, shown, I think, that his reforms were inadequately revolutionary for the time. The 1990s were difficult years. The internet was in its infancy, emails were taking hold, but social media was unheard of, and artificial intelligence was some way from reaching any kind of fulfilment. With hindsight, such a foundational reform would better have waited another 10 or 15 years. In another sense, it was already well overdue. I will try to explain what I mean.

The main changes made in 1999 by the CPR

4. There were a number of big changes in 1999. One of the most irritating was the deletion of much of the incredibly useful commentary that had grown up over the years to accompany the Rules of the Supreme Court (“RSC”). Ever since then, I have guarded my personal copy of 1999 White Book with my life, and still sometimes refer to it. For a person who spends 90% of his time advocating new technologies and LawTech, that is a remarkable commendation of its comprehensive quality. Yet it was that comprehensiveness that led to its downfall.
5. The RSC and the (relatively) miniscule 1999 White Book in which they were included were thought to be too complex for litigants in person, too steeped in the Judicature Acts of 1873-1875, and simply too impenetrable. That was all true, but some of us still talk about Order 14 instead of Part 24 (summary judgment), and about Order 11 instead of Part 6.36 (service out).
6. Let me look briefly at the main features of the new Civil Procedure Rules 1999.

The main changes brought about by the CPR

7. The CPR introduced the ubiquity of witness statements, which were until then only used in special cases in the Commercial Court. It thereby front-loaded the costs of civil litigation at a stroke.
8. The CPR brought much stricter time limits and the (extraordinary) idea that if you wanted to bring civil proceedings, you had to get on with them. This was a very good thing, but has ultimately resulted in strict rules that have caused difficulty in the legal profession. The two cases that made the law clear were *Mitchell v. News Group Newspapers Ltd.* [2013] EWCA Civ. 1537 and *Denton v. T. H. White Ltd.* [2014] EWCA Civ 906. I was partly

responsible for the latter, but now may not be the time to go into details. The cases are very well known.

9. The CPR ushered in the concept of the Case Management Conference, which has been a successful but time-consuming innovation. If the reforms had occurred 10 years later, they might well have provided for CMCs to be undertaken, as a rule, by telephone, video or even online.
10. The CPR also introduced a much more rigorous approach to the use of experts and their duties to the courts. They highlighted the availability of a single court expert, but that has never become the norm. Moreover, the strict rules about expert evidence have, to a large extent, been honoured only in the breach. That is still an area that needs attention.
11. Finally, the CPR brought an entirely new approach to disclosure. They limited disclosure to essential documents under the “standard disclosure” provisions, replacing the “*Peruvian Guano*” “train of enquiry” disclosure which was the default position under the RSC. *Peruvian Guano* disclosure remained available, of course in exceptional circumstances. That approach has already been dramatically changed again by the Disclosure Pilot introduced in January 2019 in the Business and Property Courts. That change was made because even the limited ‘standard disclosure’ brought in by the CPR was found by business litigants to be costly and unnecessarily inflexible.

What should the CPR have done?

12. To answer the question “what should the CPR have done?” requires a lengthy answer. It was, as I have already intimated, not obvious in 1999 that a technological approach to civil litigation was going to be imperative within a very short timeframe.
13. Undoubtedly the Woolf Reforms were radical in their day, but they did not, I think, shake up what was an already antediluvian system as much as they could have done. It

must be recalled that the way we litigate was pretty well established at the end of the 19th century – even the courtrooms used in the Royal Courts of Justice were and still are the laid out in the same way as they were then.

14. The things that were changed were, in many cases, totemic. Our “train of enquiry” discovery was thought to be one of the main reasons that overseas litigants wanted to use our courts in London, and critics feared that our courts would thereby become less attractive to overseas litigants. That proved to be an error, but it was then a widely held belief.
15. Abolishing evidence in chief in favour of witness statements was regarded by many as a revolution. It turned out to be a mixed blessing, because witness statements became gargantuan and costly, and did not stick to the main evidential points in issue, but began over time to range far and wide over the entire history of the relationship between the parties. They were drafted by lawyers and often moved miles away from the *ipsissima verba*¹ of the witnesses. Moreover in some cases, the opportunity to hear a party’s own account of what happened gave a judge a better insight into who was telling the truth than any number of lawyer-drafted documents. A working party in the Business and Property Courts is about to report on how some of the bad practices that witness statements have created or perpetuated can now be improved.
16. Expert evidence probably needed a much more radical shake up even in 1999, because experts reports have never stopped growing, and the numbers of experts has proliferated, even though, to be fair, the CPR has led to rather less time being spent in cross-examining experts; even if the judge time used in reading them has increased exponentially.
17. All this though is said with a large dollop of hindsight. At the time, I, like many of my colleagues, wondered whether

¹ The precise words.

“Woolf would work”, and whether we were potentially throwing the baby out with the bath water. As it turned out we were not. To take the analogy too far: there was plenty of bath water that we could have thrown out, but that was in fact left behind.

18. Woolf could, and maybe should, have been much more radical, but had it been so, it would have quite possibly taken a wrong direction, because it is only now that we can see the direction of travel of the technological revolution that is undoubtedly going to lead to major reforms of the litigation process. That is why I said earlier that I thought that maybe Woolf came too soon. It may, however, be that at least two, if not more, bites at the cherry will be needed if we are to make civil litigation fit for the 21st century.

Setting the scene for reforms to the CPR

19. I have already alluded to some of the necessary reforms: disclosure, experts, witness statements and CMCs to begin. What I want to do in the remaining time, however, is to give you a taste of what I think can now be done to reform the civil litigation process if we are to keep London and English law in the vanguard of international commercial litigation and indeed arbitration – something I am determined to do everything possible to achieve – particularly as we prepare to leave the European Union.
20. I think the reform will need to make full use of innovative technologies including artificial intelligence. There are, I think, 4 strands to the process: the rise and rise of online dispute resolution, the integrated use of numerous methods of alternative dispute resolution, a dedicated dispute resolution process to resolve disputes arising from smart legal contracts on the blockchain, and finally the reform of our established court-based civil litigation process represented by the CPR.
21. The first three are beyond the scope of this talk, but they are critical to the fourth. Online dispute resolution will develop

to absorb many types of case that at the moment are thought to be immune to it. That is because it provides excellent access to justice. It is economical in terms of legal fees, time, and travelling, and it provides online what young litigants and modern business people are expecting to be able to do – namely to resolve their disputes as they resolve or obtain everything else by the use of their various devices and the internet. But court hearings will still take place – as ultimately they may be needed to resolve the hardest cases arising in the online space. Nonetheless, the growth of ODR will provide a direction of travel for the technological reforms of the court-based process for high profile, administrative or commercial, business and property cases.

22. I have given lectures recently about dispute resolution under smart legal contracts. Suffice it to say this afternoon that there will need to be a dedicated streamlined dispute resolution process for those disputes if we are to persuade the tech community that they need a legal process at all.²

Reforms needed now to the CPR

23. If we are to ensure that the UK remains a leading dispute resolution jurisdiction of choice for international business, intelligent technological reform of our current system is a necessity. But how should we reform? It may be that some overseas litigants love the English court scene and a leisurely pace. That may or may not be so, but the system we use now is, despite the Woolf reforms, and despite the best efforts of the judiciary, too expensive, too time consuming, and inadequately accessible.

² See July 2019 at <https://www.judiciary.uk/announcements/speech-by-sir-geoffrey-vos-chancellor-of-the-high-court-resolving-disputes-about-smart-contracts/>

24. The CPR currently acknowledges the existence of the internet, electronic documents and technology, but does not sufficiently embed technological processes. We use CE-filing, but then print out bundles of documents for all hearings in court. We can do disclosure electronically, but often actually use assistant solicitors to trawl through massive piles of documents, many of which are available electronically in the first place.
25. LawTech programmes are now available that can, if used imaginatively and appropriately, assist in the dispute resolution process. That is an essential first step.
26. What needs also to be done now is to re-think the essentials of high-quality judicial dispute resolution in a technological era. That process will be informed by online dispute resolution as it develops, and by the way in which disputes arising from smart contracts are eventually dealt with. The overall picture will change rapidly and the approach of the legal community will also need to develop if it is to continue to provide what our national and international users require.
27. One of the essentials, for most litigating parties, is the quality of the judiciary. Despite the possibility that it may be feasible in time for machines to make decisions, we are not at that stage now. But judges may not always require all the peripheral and costly processes of the CPR, in order to make appropriate decisions in which the litigating parties will have confidence. We need to think carefully about what precisely is required for that purpose. And then, we also need to work out how LawTech programmes and artificial intelligence can help support those processes and make things quicker and cheaper.
28. On this theme, it is worth noting that the CPR is made of mainly procedural rules, and the simplification that Lord Woolf embarked upon could now go much further with technological assistance. Procedural rules are mostly not essential to the delivery of a just outcome – some are important, of course, but others could quite possibly be scaled back considerably. Judges are assisted by a tight

procedural framework, but the question for the future will be what parts of that framework are necessary, what parts are simply desirable and what parts can be safely left on one side? I come back to public confidence. Justice is nothing without it. But we need to ensure that the public represented by generation Z as well older generations have confidence in the system. They will not have that confidence without what I have already described as “intelligent” reform.

29. I want to bring this short speech to a close by mentioning something prosaic but important. One of the most successful new procedures introduced in the last few years has been the abbreviated process adopted in the Intellectual Property and Enterprise Court (“IPEC”). It has capped costs and an expedited procedure which delivers outcomes without excessive commercial risk for the parties to small IP disputes. We have recently introduced the capped costs pilot in parts of the Business and Property Courts – specifically the London Circuit Commercial Court, and the entire BPCs in Manchester and Leeds. It is offered on an opt-in basis for cases worth up to £250,000. Witness statements, if ordered, are limited in length and can deal only with issues set out in the list of issues. Parties are limited to two witnesses each. There is normally no expert evidence, and the trial takes place no more than eight months after the CMC, and lasts no longer than two days. Overall costs are capped at £80,000.
30. I do hope that you will give this pilot a try – it seems to me to represent a useful direction of travel, showing how we can simplify complex disputes for expedited cost-effective resolution. It should help us answer the difficult questions about how technologically enabled dispute resolution under a reformed CPR should look in 2050.

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