

# **The Challenge of Civil Justice Reform: Effective Court Management of Litigation**

**By  
Adrian Zuckerman**

**Reprinted from  
*City University of Hong Kong Law Review*  
Volume 1:1 October 2009 pp 49–71**

© *City University of Hong Kong Law Review*



# The Challenge of Civil Justice Reform: Effective Court Management of Litigation

*Adrian Zuckerman\**

*The Civil Justice Reform has culminated in important rule changes to the Rules of the High Court and to the Rule of the District Court. Although the general framework of civil litigation remains largely the same, the new rules radically change the way in which the litigation process is managed. It is now for the court to determine the intensity and pace of the litigation process by imposing on the parties case management adapted to the needs of the particular case. The court's case management task is guided by the underlying objectives. These make it plain that the courts must not only decide cases in accordance with the law and the true facts but also by the use of proportionate court and party resources and with reasonable expedition. The new rules introduce thereby a three-dimensional concept of justice, in which efficiency and expedition are as important as the correctness of the outcome. However, court management will achieve the underlying objectives only if parties comply with case management deadlines. In this regard, the Hong Kong rules are better designed to secure timely compliance than their English counterpart and are, therefore, more likely to achieve the intended objectives.*

## I. INTRODUCTION — THE DRIVE TO COURT MANAGED LITIGATION

The civil litigation system of Hong Kong (HK) has been recently subjected to close scrutiny in the wake of the Working Party on Civil Justice Reform (CJR), which was established by the Chief Justice of Hong Kong with the remit: 'To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed'.<sup>1</sup> In the Executive Summary of its Interim Report of 2001, the working party stated:

---

\* Professor of Civil Procedure, University of Oxford; Fellow of University College, Oxford; Honorary Professor, School of Law, City University of Hong Kong. This article draws on some of the themes that the author developed in 'The New Civil Justice Reform Court-Managed Litigation System' in Martin Rogers (gen ed), *Hong Kong Civil Procedure 2010 — The Hong Kong White Book* (Sweet & Maxwell, Hong Kong 2009).

<sup>1</sup> See C Cameron and E Kelly, *Principles and Practice of Civil Procedure in Hong Kong* (2<sup>nd</sup> edn Sweet & Maxwell (Asia), Hong Kong 2009) 1.

The available evidence indicates that the civil justice system in Hong Kong shares the defects identified in many other systems. In varying degrees, litigation in our jurisdiction:

- Is too expensive, with costs too uncertain and often disproportionately high relative to the claim and to the resources of potential litigants.
- Is too slow in bringing a case to a conclusion.
- Operates a system of rules imposing procedural obligations that are often disproportionate to the needs of the case.
- Is too susceptible to tactical manipulation of the rules enabling obstructionist parties to delay proceedings.
- Is too adversarial, with the running of cases left in the hands of the parties and their legal advisers rather than the courts, and with the rules often ignored and not enforced.
- Is incomprehensible to many people with not enough done to facilitate use of the system by litigants in person.
- Does not do enough to promote equality between litigants who are wealthy and those who are not.<sup>2</sup>

The Working Party identified a number of ailments shared by common law jurisdictions including Hong Kong.<sup>3</sup> These included, expense, delay, uncertainty, and ‘overly adversarial’ practices. Further, there was perceived a lack of equality between wealthy litigants and poorer ones. In addition, the procedural rules were ‘incomprehensible’ to many members of the public. Finally, the courts were ‘fragmented’ with no one having ‘clear overall responsibility’ for their administration. In addition to these problems, Hong Kong suffered additional ‘pressures’ caused by expense, delay, complexity and unrepresented litigants. The Working Party in its Interim Report concluded ‘The faults in the civil justice system are generally seen to be the product of distortions caused by its adversarial design.’<sup>4</sup> The principal defect in the ‘adversarial design’ was the primacy of the parties (and their lawyers) in the litigation process when compared to the courts’ ‘passive’ role.

In a section headed ‘Coordinated reforms on a broad front’, the Working Party acknowledged that any rule changes would need to be ‘supported by judicial and court administrative staff in sufficient numbers, properly resourced and given appropriate

---

<sup>2</sup> The Interim Report of the Chief Justice’s Working Party on Civil Justice Reform, Executive Summary [24].

<sup>3</sup> Gary Meggitt and Farzana Aslam, ‘Civil justice Reform in Hong Kong — A Critical Appraisal’ (2009) 28 *CJQ* 111.

<sup>4</sup> The Interim Report of the Chief Justice’s Working Party on Civil Justice Reform [26] <[www.civiljustice.gov.hk/eng/archives\\_ir.html](http://www.civiljustice.gov.hk/eng/archives_ir.html)> accessed 25 August 2009 (hereafter referred to as ‘CJR Interim Report’). The Final Report was submitted in March 2004. The Final Report of the Chief Justice’s Working Party on Civil Justice Reform <[www.civiljustice.gov.hk/eng/archives\\_fr.html](http://www.civiljustice.gov.hk/eng/archives_fr.html)> accessed 25 August 2009.

training'<sup>5</sup> together with a change in the territory's legal culture.<sup>6</sup> The Working Party seemed resigned to the difficulty of achieving the latter. In particular, they raised the question 'To what extent will reforms to the civil justice system reduce litigation costs[?]'<sup>7</sup> and continued 'The answer requires caution.'<sup>8</sup>

As for adopting the Civil Procedure Rules (CPR), the Final Report repeated the observation that reforms had not reduced costs in England and Wales. It also alleged that the CPR had not reduced the complexity of the civil justice system in England. Whilst its 'plain English' language was clearer than that of the Rules of the Supreme Court (RSC) and the County Court Rules (CCR), the CPR itself had become just as complex and cumbersome as its predecessors. This process was fuelled, in part, by satellite procedural litigation.

This diagnosis was similar to that reached in England by Lord Woolf in his Access to Justice Reports of the mid-1990s and as we shall shortly see, also the remedy prescribed. In 2004, the Working Party published its Final Report, which was broadly implemented by the HK Civil Justice (Miscellaneous Amendments) Ordinance 2008, and reflected in changes to the Rules of the High Court (Amendment) Rules 2008 (RHC) and to the Rules of the District Court (Amendment) Rules 2008.

The strategy adopted in HK is in many respects identical to that reflected in the English CPR 1998. Like the English CPR, the HK system now expressly adopts a number of 'Underlying Objectives' (similar to the English overriding objectives), set out in RHC O.1A, r.1:

- (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
- (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
- (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- (d) to promote greater equality between the parties;
- (e) to facilitate the settlement of disputes; and
- (f) to ensure that the resources of the Court are distributed fairly.

RHC O.1A, r.2(2) stresses that: 'In giving effect to the underlying objectives of these rules, the Court shall always recognise that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.'

---

<sup>5</sup> CJR Interim Report (n 4) [191].

<sup>6</sup> Ibid [194].

<sup>7</sup> Ibid [197].

<sup>8</sup> Ibid.

RHC O.1A, r.4 states that the Court shall further the underlying objectives of the RHC by actively managing cases. Courts are given, as we will see in the next part, extensive active case management powers and this is the most important feature of the CJR. As noted above, judicial case management has increasingly become a feature of civil litigation in common law jurisdictions due to the realisation that if the parties and their legal representatives are left to manage litigation timetables and to ensure that cases are conducted as efficiently and expeditiously as possible, it may not happen. Hong Kong is no exception. RHC O.1B, r.1 lists the Court's general powers of management. RHC O.1B, r.1(1) makes it clear that the list of powers is in addition to and not in substitution for any powers given to the Court by any other rule, practice direction or enactment, or any other powers it may have. It may be useful here to refer to the extensive powers laid down in r.1(2), which reads as follows:

Except where these rules provide otherwise, the Court may by order—

- (a) extend or shorten the time for compliance with any rule, court order or practice direction (even if an application for extension is made after the time for compliance has expired);
- (b) adjourn or bring forward a hearing;
- (c) require a party or a party's legal representative to attend the Court;
- (d) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
- (e) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
- (f) consolidate proceedings;
- (g) try two or more claims on the same occasion;
- (h) direct a separate trial of any issue;
- (i) decide the order in which issues are to be tried;
- (j) exclude an issue from consideration;
- (k) dismiss or give judgment on a claim after a decision on a preliminary issue;
- (l) take any other step or make any other order for the purpose of managing the case and furthering the underlying objectives set out in Order 1A.

In addition to these wide-ranging case management powers, RHC O.1B grants the Court power to attach conditions to any orders it makes, including a condition to pay money into court, and to specify the consequences of failure to comply with an order or a condition;<sup>9</sup> to make an order of its own motion with or without hearing the parties or

---

<sup>9</sup> RHC, O1B, r1(3).

giving them the opportunity to make representations;<sup>10</sup> and to give procedural directions by way of order nisi.<sup>11</sup>

## II. THE PURPOSE OF MANAGEMENT AND ITS MEANS

Management has to have a purpose, an object to manage and an objective to reach. It is self-evident and obvious that managers have to understand what they manage and what they need to achieve through management. It is, therefore, necessary to start by identifying the enterprise that litigation management involves and what it aims to achieve.

The civil court provides a law enforcement service. The role of the civil court is not merely to mediate disputes but to give effect to our rights and enforce them. A pedestrian injured by a speeding car, for example, does not go to court asking the judge to resolve her dispute with the speeding driver. Rather, the pedestrian demands what is due to her under the law. It would, therefore, be a mistake to regard the adjudication of civil disputes as merely a dispute resolution process. If dispute resolution were all that litigants sought, alternative dispute resolution (ADR) would indeed offer an adequate substitute to expensive court proceedings. But this is not the case. No one thinks of the criminal trial as merely a dispute resolution process. On the contrary, it is widely perceived as a law enforcement process. The fact that civil litigation involves two parties advancing conflicting claims of right should not lead to the conclusion that the court is merely involved in resolving disputes. Just like in a criminal prosecution, the disposition of a civil claim requires the court to reach a decision according to the fact of the matter and the applicable law. While there are undoubted differences between the civil and the criminal processes, the fundamental purpose is the same: to support law and order by enforcing and protecting rights. Civil right holders are free to choose whether to assert their rights. But if they choose to demand court enforcement of their rights, they are entitled to expect adequate court assistance. To sum up, like its criminal counterpart, the civil court provides a public service that is crucial to the maintenance of a society governed by the rule of law: a law enforcement service.

Law enforcement in the context of civil litigation means deciding cases by establishing the true facts and correctly applying the law to them. Put differently, the court must give the parties what is due to them under the law. In a system governed by the rule of law, the law maker lays down the law and the court applies it.

The ability of the court system to deliver an adequate system of adjudication depends on resources. A well-funded and organised system would deliver better results than a poorly funded system, all else being equal. Every system is liable to error, but the more trouble we take in investigating disputes the more we are likely to reduce the risk of error. Does this mean then that the state has an obligation to provide the most accurate civil procedure regardless of cost?

---

<sup>10</sup> RHC, O1B, r2(4)

<sup>11</sup> RHC, O1B, r3.

It would be absurd to say that we are entitled to the best possible legal procedure whatever it takes, when we cannot lay a credible claim to the best possible health service or to the best possible transport system. Yet, it would be equally absurd to suggest that procedure need not strive to achieve any level of accuracy to satisfy the demands of justice. We are entitled to expect a procedure that strives to provide a reasonable measure of protection of rights, commensurable with the resources that we can afford to spend on the administration of justice.

Once we have accepted that the commitment to accuracy and expedition cannot be absolute and boundless, we must also accept that the choice of the court service must involve compromises. Since the community cannot afford a limitless investment in the administration of justice, we must achieve compromise whereby the level of service reflects the degree of support that can reasonably be expected to be given to legal services. Similarly, we cannot expect the public purse to provide us with a completely free service. Just as we are prepared to pay for other public services (such as higher education, public broadcasting, or the issue of passports) so we would expect to meet some of the court's costs through court fees. Equally, few are averse to paying for professional assistance with litigation to ensure that we are adequately represented by well-trained professionals. However, the cost of going to law must not be so exorbitant as to make access to law impractical for persons of ordinary means.

All citizens are entitled to demand a reasonable adequate service commensurate with the means available to the law-maker, be it legal services, health services or any other public service. A public service will be considered adequate if it is effective, efficient and fair.

*Effective* here means delivering fairly well-founded judgments (in terms of fact finding and correct application of the law), within a reasonable time, and with proportionate investment of litigant and public resources. *Efficient* implies that the resources available to the court are used to maximise the benefits that the users of the service receive and are not wasted unnecessarily. *Fair* means that available resources are justly distributed between different litigants and between existing and future litigants.

The new HK rules, like the English CPR, now recognise that these three imperatives are essential to delivering an adequate civil justice service. RHC O.1A, r.1, therefore, identifies the following as the underlying objectives of the CJR:

- increasing the cost-effectiveness of practices and procedures to be followed in relation to proceedings before the Court;
- ensuring that a case is dealt with as expeditiously as is reasonably practicable;
- promoting a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- ensuring fairness between the parties;
- facilitating the settlement of disputes; and

- ensuring that the resources of the Court are distributed fairly.<sup>12</sup>

These components objectively spell out what is required to deliver an effective, efficient and fair civil justice service.

The HK rules recognise that management is the key to success. RHC O. 1A, r. 2 requires the Court to ‘seek to give effect to the underlying objectives of these rules when it — (a) exercises any of its powers (whether under its inherent jurisdiction or given to it by these rules or otherwise); or (b) interprets any of these rules or a practice direction.’ Crucially, RHC O. 1A, r. 4 states that the ‘Court shall further the underlying objectives of these rules by actively managing cases’. RHC O. 1A, r. 4(2) spells what this involves:

Active case management includes—

- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- (d) deciding the order in which the issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as practicable on the same occasion;
- (j) dealing with the case without the parties needing to attend at court;
- (k) making use of technology; and
- (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

To enable the Court to carry out these tasks, the Court is given, as noted before, extensive case management powers by RHC O. 1B, r. 1(2).<sup>13</sup>

---

<sup>12</sup> RHC, O1A, r1.

<sup>13</sup> See page 52 of this article.

In defining the objectives and giving the Court adequate powers to attain those objectives, the legislature has laid a solid foundation for the delivery of a well-managed public service. Without objectives and without the necessary powers, no management can succeed whether in the private or public sphere. But objectives and powers are merely pre-conditions for delivering satisfactory results. Something else is needed: competent managers. Namely, managers that understand their task and are willing to work towards it, and know how to go about it. The managers in the present context are the judges, for they have been charged with the task of managing litigation. Consequently, the remainder of my discussion in this article is devoted to examining the performance of judges as managers.

### III. NO UNMANAGED SYSTEM

At first blush, litigation management ought to be simple when compared with other public services such as health or education. Litigation management requires an appropriate match between process and dispute. Difficult, complex or important cases require more intensive judicial involvement than easy, simple and relatively unimportant cases. This is precisely what most of all the major procedural systems, both common law and non-common law, have sought to do for well over a century now. The means for doing so were by means of directing cases to different first instance courts, depending on value. Most systems have at least two courts of first instance, one for low value cases and one for high value cases: in HK, the District Court and the High Court and in England, the County Court and the High Court. The problem with this system was that the match was poor for a number of reasons. First, because some high value cases did not really justify more intensive judicial attention. Second, because there was pressure to push more and more cases into the higher tier court due to a perception it provided better quality adjudication. Lastly, because within each court there was poor management of individual cases.

The old system was not entirely unmanaged. Parties needed to apply to court for extensions of time. The court had to decide the consequences of failure to comply with process requirements. The trouble stemmed from the court's haphazard approach to keeping litigants to their process requirements. It was particularly damaging that the court was insufficiently focused on delivering a satisfactory system of civil justice for the benefit of all litigants. Where the court leaves control of the litigation process to the parties, each party is bound to pursue the course that best suits her interests, which may or may not be consistent with a fair and expeditious resolution of the case. Even if one party is concerned to bring the case to a speedy conclusion, the opponent may have other ideas. Moreover, no amount of party co-operation can by itself lead to effective overall use of court resources. Litigants are not privy to the administrative workings of the court system; they have no information regarding overall case-loads or of the availability of judicial manpower or of budgetary constraints. Even if they had such information, they would be in no position to put it to good use because adequate management of resources necessitates central policy-making and well-managed implementation. Thus, it was not so much that under the old system there was no court control and no management of litigation, but that there was

weak control, and the management failed to deliver a satisfactory system of civil litigation. When it comes to administering justice, it may be said that there is good management, bad management and many variations in between, but there is no such thing as an unmanaged system.

Once it is accepted that adjudication of civil disputes is a public service maintained for the benefit of the community as a whole, it follows that its provision must be managed for the general good of the community. This is now implicit in the underlying objectives and well understood by the courts. What may, however, be less well appreciated is that court management of litigation means not just management of individual disputes but also the continual review of the performance of the system and periodic adjustment of responses to emerging problems. The use of the court's discretionary powers is of necessity fact-dependent. The overriding objective requires the court to ensure that individual cases are efficiently and effectively disposed of. But efficiency and effectiveness are also something that the system as a whole must deliver, which requires setting up general standards, continual monitoring, periodic assessment of overall performance and the occasional adjustment.

#### **IV. THE MACHINERY OF PRODUCING CASE MANAGEMENT DIRECTIONS AND ENFORCING COMPLIANCE WITH DEADLINES**

The machinery for laying down a litigation management plan is mostly set out in the extensively modified RHC O.25. In actions begun by writ, the parties are required within 28 days of the close of pleadings to complete the questionnaire prescribed in the relevant practice direction<sup>14</sup> in order to provide the Court with the information necessary for giving appropriate case management directions. These directions will specify the steps to be taken before trial and set out a time table for their completion. The case management plan will be sound and robust only if it takes into account the needs of the particular case in hand. A number of provisions are, therefore, introduced to ensure the fullest possible flow of information from party to court.

Naturally, the information is possessed by the parties. They are, therefore, best placed to devise an appropriate management plan. Consequently, the rule encourages the parties to agree amongst themselves the appropriate pre-trial processes and a timetable.<sup>15</sup> One must assume that the Court retains the power to override the parties' proposed timetable. It is only too likely, however, that parties would be unable to agree or that one or the other would have no sense of urgency to move forward with the case. To ensure that the case does not go to sleep, the rules now state that if the parties have not agreed on management directions, the plaintiff *must* take out a case management summons so that the Court may give directions relating to the management of the case. To ensure that this happens, RHC

---

<sup>14</sup> RHC, O25, r1(1A).

<sup>15</sup> *Ibid.*

O.25, r. 1(4) provides that if the plaintiff does not file the questionnaire or take out a case management summons, the defendant may herself take out a case management summons or apply for an order to dismiss the action.

The adequacy of court ordered case management directions depends on the extent to which the Court appreciates the needs of the case. This, in turn, crucially depends on the completeness of the information provided by the parties. The rules seek to ensure that the Court is given ample information in a number of ways. RHC O.25 confers on the Court extensive powers to require the parties to provide it with all the necessary information. To start with, RHC O.25, r.6(1) imposes on the parties a ‘full and frank’ information disclosure obligation. It states that ‘it shall be the duty of the parties to the action and their advisers to give all such information and produce all such documents as the Court may reasonably require for the purposes of enabling it properly to deal with the [management] summons.’ To overcome party reluctance to disclose sensitive information at an early stage, the Court is empowered to authorise information to be given to the Court without being disclosed to other parties. Finally, failure to provide information required by the Court may result in that party’s pleading being struck out.<sup>16</sup>

Having been provided with the necessary information, the next step is to devise a litigation management plan. The key provision in this regard is RHC O.25, r.1A concerning the case management timetable:

- (1) .... as soon as practicable after the completed questionnaire has been filed with the Court, the Court shall, having regard to the questionnaire and the needs of the case—
  - (a) give directions relating to the management of the case and fix the timetable for the steps to be taken between the date of the giving of those directions and the date of the trial;
  - (b) fix a case management conference if the Court is of the opinion that it is desirable to do so; or
  - (c) direct the plaintiff to take out a case management summons if he has not already done so under rule 1(1B)(b).

In uncomplicated disputes, the completed questionnaires should be sufficient to enable the Court to fix a timetable for the steps to be taken during the pre-trial phase, so that there would be no need for a hearing.<sup>17</sup> This timetable must include ‘(a) a date for a pre-trial review; or (b) the trial date or the period in which the trial is to take place.’<sup>18</sup> In the more complex cases a management conference may be needed for giving appropriate directions, for fixing a timetable and for making provision for pre-trial review. Whether or not there has been a hearing of a case management summons,

---

<sup>16</sup> RHC, O25, r6(3).

<sup>17</sup> RHC, O25, r8 lays down automatic directions for personal injury actions.

<sup>18</sup> RHC, O25, r1A(3).

the parties may apply to the Court to vary its directions, and the Court may do so of its own motion.<sup>19</sup>

However, the rule-maker takes good care to ensure that case management directions are not varied easily at the whim of a party. To this end, RHC O.25, r.1B contains the following provisions:

- (2) A party may apply to the Court if he wishes to vary a milestone date.
- (3) The Court shall not grant an application under paragraph (2) unless there are exceptional circumstances justifying the variation.

A milestone date is ‘(a) a date which the Court has fixed for (i) a case management conference; (ii) a pre-trial review; or (iii) the trial; or (b) a period fixed by the Court in which a trial is to take place’.<sup>20</sup> The intention of this rule is unambiguous: milestone dates are to be taken seriously; a variation will be allowed only where there are some exceptional circumstances to justify a variation.

Even non-milestone dates are fortified. A non-milestone date is any ‘date or period fixed by the Court, other than a date or period specified in the definition of “milestone date”’.<sup>21</sup> This, therefore, includes any deadline fixed by the Court for the performance of a process requirement. Thus, RHC O.25, r.1B goes on to state:

- (4) A non-milestone date may be varied by procuring an order to that effect by way of a consent summons.
- (5) A party may apply to the Court if he wishes to vary a non-milestone date without the agreement of the other parties.
- (6) The Court shall not grant an application under paragraph (5) unless sufficient grounds have been shown to it.
- (7) Whether or not sufficient grounds have been shown to it, the Court shall not grant an application under paragraph (5) if the variation would make it necessary to change a trial date or the period in which the trial is to take place.

The effect of RHC O.25, r.1B(6) above is that a party may now hold his opponent even to non-milestone deadlines stipulated in the case management directions unless the opponent has sufficient grounds for obtaining more time. For instance, suppose the defendant has dragged her heels about discovery and now seeks the claimant’s consent for an extension of time to give discovery. The claimant may refuse in the knowledge that if the defendant applied to court, the defendant would get an extension only if he showed sufficient grounds.

---

<sup>19</sup> RHC, O25, r1B states: ‘(1) The Court may, either of its own motion or on the application of a party, give further directions relating to the management of the case or vary any timetable fixed by it under rule 1A.’

<sup>20</sup> RHC, O25, r1B(8).

<sup>21</sup> *Ibid.*

Not only failure to meet deadlines imposed by a case management timetable but also failure to cooperate with the Court in devising an appropriate timetable in the first place can have serious consequences. Thus, RHC O.25, r.1C(1) provides that where ‘the plaintiff does not appear at the case management conference or pre-trial review, the Court shall provisionally strike out the plaintiff’s claim’ (and the same goes *mutatis mutandis* for a counterclaim). Where the Court has provisionally struck out a claim under this rule, the plaintiff may apply to the Court for a restoration of the claim before the expiry of 3 months from the date of the case management conference or pre-trial review. To ensure that litigants do not take this matter lightly, RHC O.25, r.1C states:

- (4) The Court may restore the claim or counterclaim subject to such conditions as it thinks fit or refuse to restore it.
- (5) The Court shall not restore the claim or counterclaim unless good reasons have been shown to the satisfaction of the Court.

The power to impose conditions on a restoration order is quite useful. It would enable the Court, for example, to require a claimant to provide security for the defendant’s costs as a condition for the restoration. If the plaintiff does not apply under this rule for restoration within the 3 months period or her application for restoration is refused, then the claim stands dismissed and the defendant is entitled to her costs.

The CJR has established an intricate and well-regulated court managed system of litigation, which now enables the Court to dictate the pace and intensiveness of the litigation process and monitor compliance with its management plan. Unlike in the past, case management directions may from the start be tailored more precisely to take account of the needs of the particular case; now deadlines may be carefully calibrated to take account of the particular needs of the dispute in question. Crucially, RHC O.25 rules 1A and 1B now underpin case management directions with strict compliance rules designed to ensure that parties perform their process requirements in time and that deviation from deadlines will require convincing justification, especially where such deviation would have a knock-on effect on the milestone dates.

## V. LIMITED TOLERANCE OF PARTY DEFAULT

One of the reason for the poor performance of the civil justice system prior to the CJR was the tolerance that the Court showed to party default, especially to failure to meet deadlines. The pre-CJR and CPR approach to party failure to comply with process deadlines was articulated in the House of Lords case of *Birkett v James*,<sup>22</sup> which was followed by the Hong Kong courts on many occasions.<sup>23</sup> In *Birkett*, Lord Diplock stated:

---

<sup>22</sup> [1978] AC 297; [1977] 2 All ER 801.

<sup>23</sup> See for instance: *Secan Ltd v Hsin Yieh Architects & Associates Ltd* [2002] 3 HKLRD 227 (CA) 231 (Le Pichon JA); *New China Hong Kong Group Ltd v AIG Asian Infrastructure Fund LP* [2005] 1 HKLRD 383 (CA), 401–402 (Woo VP).

The power [to dismiss an action for want of prosecution] should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party.<sup>24</sup>

What is remarkable about Lord Diplock's dictum is that neither the imperative of timely resolution nor the need for efficient use of court and party resources get so much as a mention. The avoidance of unnecessary delay or cost played no part in the court's exercise of discretion. No matter how inordinate and how inexcusable a delay may have been, an action could not be struck out if a fair trial was still possible and if the defendant had not suffered serious prejudice. And in any event, an action would not be dismissed for want of prosecution if the limitation period had not yet expired because the claimant would have been free to bring a fresh action. The House of Lords made this clear in *Department of Transport v Chris Smaller (Transport) Ltd*:

What would be the purpose of striking out in such circumstances? If there can be a fair trial and the defendant has suffered no prejudice, it clearly cannot be to do justice between the parties before the court; as between the plaintiff and defendant such an order is manifestly an injustice to the plaintiff. The only possible purpose of such an order would be as a disciplinary measure which by punishing the plaintiff will have a beneficent effect on the administration of justice by deterring others from similar delays.<sup>25</sup>

The consequences of this approach were inevitable: a weakening of the normative force of the time limits, for litigants could rest assured that failure to comply with time limits would have no serious consequences for their case except in the most extreme situations. Even disobedience of peremptory orders i.e. 'unless orders' on pain of specified sanctions would rarely have adverse consequences. In addition to creating a normative deficit, this policy gave rise to a whole industry of satellite litigation on the interpretation of the *Birkett v James* principles. By 1993, the second limb of Lord Diplock's test had acquired no fewer than 15 sub-rules. Resolving an argument concerning these rules could require a two-day hearing in the Court of Appeal and a judgment running into many pages.<sup>26</sup>

The Court's approach to litigants' failure to meet deadlines produced a culture of sloppy compliance. It encouraged interlocutory wrangling about process since reluctant parties could get the dispute kicked into the long grass by inactivity, from which the case

---

<sup>24</sup> [1978] AC 297, 318; [1977] 2 All ER 801, 805.

<sup>25</sup> [1989] AC 1197, 1207; [1989] 1 All ER 897, 903.

<sup>26</sup> *Trill v Sacher* [1993] 1 All ER 961.

could be rescued and brought to a conclusion only by numerous applications to court. This increased the cost of litigation and, more significantly, rendered it wholly unpredictable. Embarking on litigation required an open ended financial commitment which could exceed the amount in dispute and which was, therefore, beyond the means of most citizens.

## **VI. ENFORCEMENT OF DEADLINES AND SANCTIONS UNDER THE CJR**

Although the case management timetable is now of far greater importance than in the past, and although both milestone and non-milestone dates are meant to be taken far more seriously than in the past, the Court retains discretion in dealing with party failure to comply. Mention may be made here of the time honoured RHC O.2 r.1 which effectively provides that any failure to comply with the requirements of the rules, including failure to meet deadlines, will not nullify the proceedings but that instead the Court make such an order as it thinks fit. As far as time requirements are concerned, the Court has discretion to extend them under RHC O.1B, r.1, which states:

- (2) Except where these rules provide otherwise, the Court may by order —
  - (a) extend or shorten the time for compliance with any rule, court order or practice direction even if an application for extension is made after the time for compliance has expired;

Where the extension is retrospective, i.e. made after the time for compliance has expired, the Court will have effectively forgiven the default.

Wide though the RHC O.1B, r.1 discretion is, it is by no means unlimited. First, it is bound by the underlying objectives, because O.1A, r.2(1) requires it to give effect to the underlying objectives when it exercises its powers under the rule. More important still is the limitation indicated by the opening words of O.1B, r.1(2): ‘except where these rules provide otherwise’. The most significant provision to the contrary is to be found in RHC O.25, r.1B(3), which states:

- (2) A party may apply to the Court if he wishes to vary a milestone date.
- (3) The Court shall not grant an application under paragraph (2) unless there are exceptional circumstances justifying the variation.
- ...
- (5) A party may apply to the Court if he wishes to vary a non-milestone date without the agreement of the other parties.
- (6) The Court shall not grant an application under paragraph (5) unless sufficient grounds have been shown to it.
- (7) Whether or not sufficient grounds have been shown to it, the Court shall not grant an application under paragraph (5) if the variation would make it necessary to change a trial date or the period in which the trial is to take place.

It is clear that this provision is intended to provide a complete regime for dealing with applications for varying milestone and non-milestone dates and that it, therefore, displaces the general and unlimited discretion in RHC O.1B, r.1.<sup>27</sup>

This point may be illustrated by the following example. The claimant has been ordered to file an expert report by a certain date which is not a milestone date. Near the expiry of the time limit the claimant applies for an extension of time. This will immediately engage RHC O.25, r.1B which provides that the Court will not extend the time of a non-milestone date unless sufficient grounds have been shown. So, the claimant would have to demonstrate sufficient grounds and would not be able to invoke the general discretion in RHC O.1B, r.1. Furthermore, if an extension of time would involve a change of the trial date, the Court would not be able to grant such extension because RHC O.25, r.1B(7) denies it the power to do so.

This result is not as draconian as may appear at first sight. The case management timetable will have allowed adequate time for completing all the pre-trial processes, including the filing of expert reports. A party who encounters difficulty in meeting a deadline can raise the matter with the Court at a case management conference and ask for more time. If no such opportunity presents itself, a party can apply to court under RHC O.25, r.1B, which empowers the Court to 'give further directions relating to the management of the case or vary any timetable fixed by it under rule 1A'. So, a party who genuinely strives to comply with his process obligations but encounters obstacles can always obtain the Court's help. What the rules do not tolerate, and rightly so, is a situation where a party makes no effort to comply, leaves it to the last moment, and then finds that she cannot comply within the time left. Even so, the party may be able to obtain an extension but not if it would involve postponing the trial date or the trial period because the rule-maker is not prepared to allow party neglect to disturb the Court's allocation of its time and its resources. One of the underlying objectives is 'to ensure that the resources of the Court are distributed fairly.'<sup>28</sup> A party who seeks to vacate a trial date, which was reserved for her and obtain instead a later slot in the Court's time table, effectively denies that time to another litigant which is unjustified and unfair.

Finally, although RHC O.25, r.1B(7) does not allow an extension of time of a non-milestone date that would involve a postponement of the trial, it does not mean that the Court is entirely powerless. A litigant is always free to grasp the nettle and apply directly for a variation of the trial date or trial period. However, this would have to be done under RHC O.25, r.1B(2) and (3) and the applicant would have to show exceptional circumstances justifying the variation, which would be well nigh impossible in the example we have been considering.

The means of enforcing compliance with court orders generally and timetables in particular are much enhanced by RHC O.2, r.3:

---

<sup>27</sup> Just how complete this regime is can be gauged from a comparison with CPR 28.4 and CPR 29.5 which do not lay down a detailed or complete regime for varying the case management timetable.

<sup>28</sup> RHC, O1A, r1(f).

- (1) The Court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule or court order.
- (2) When exercising its power under paragraph (1), the Court shall have regard to—
  - (a) the amount in dispute; and
  - (b) the costs which the parties have incurred or which they may incur.
- (3) Where a party pays money into court following an order under paragraph (1), the money is security for any sum payable by that party to any other party in the proceedings.

This rule provides the Court with a very useful enforcement measure, in that it may require a party who for no good reason failed to comply with a rule or court order to pay money into court as a condition to being allowed to proceed with her claim or defence or as a condition to being allowed to avail herself of any other procedural measure. For example, a party who has repeatedly failed to give discovery may be saved from having her pleading struck out by such payment. Or, to take another example, a party who has failed to file an expert report by the stipulated date, may be allowed to file the report late but only on condition of payment into court. Such payment is of real value to the other party since the payment is to be held in court as security for any sum payable by the defaulting party to any other party.

Two further rules are important to the success of the new case management system, RHC O.2, r.4 and r.5, which state:

4. *Sanctions have effect unless defaulting party obtains relief* (O. 2, r. 4)

Where a party has failed to comply with a rule or court order, any sanction for failure to comply imposed by the rule or court order has effect unless the party in default applies to the Court for and obtains relief from the sanction within 14 days of the failure.

5. *Relief from sanctions* (O. 2, r. 5)

- (1) On an application for relief from any sanction imposed for a failure to comply with any rule or court order, the Court shall consider all the circumstances including —
  - (a) the interests of the administration of justice;
  - (b) whether the application for relief has been made promptly;
  - (c) whether the failure to comply was intentional;
  - (d) whether there is a good explanation for the failure to comply;
  - (e) the extent to which the party in default has complied with other rules and court order;

- (f) whether the failure to comply was caused by the party in default or his legal representative;
- (g) in the case where the party in default is not legally represented, whether he was unaware of the rule or court order, or if he was aware of it, whether he was able to comply with it without legal assistance;
- (h) whether the trial date or the likely trial date can still be met if relief is granted;
- (i) the effect which the failure to comply had on each party; and
- (j) the effect which the granting of relief would have on each party.

Where a party fails to comply with an ‘unless order,’ the consequence will take effect automatically with no need for a further application. Suppose, for example, that a claimant did not comply with an order that stipulated that failure to give discovery by a certain date would result in the claimant’s case to be struck out. As soon as the claimant defaults, his case would stand struck out and he will not be able to take any further steps in the case without relief from sanction. The defaulting party must apply for relief from sanction within 14 days. As soon as the 14 day period expires, the defendant would be able to apply for judgment dismissing the action. On the hearing of such application, the claimant will not be able to advance excuses for the default since the application will only be concerned with working out the consequences following from the striking out that has already taken place.<sup>29</sup>

The discretionary power to grant relief from sanctions is first and foremost governed by the underlying objectives. In addition, RHC O.2, r.5 lists the matters that a court must take into account when considering an application for relief from sanctions. It should be noted, however, that the list in r.5 is not exhaustive and that the Court must have regard to all the circumstances of the case and not just to the listed factors.

By its terms RHC O.2, r.5 applies only to applications ‘...for relief from any sanction imposed for a failure to comply with any rule or court order,...’. It clearly applies in situations where the consequences of non-compliance follow from an ‘unless order,’ as explained earlier. However, there may be other situations where RHC O.2, r.5 will come into play. For example, a party has been guilty of some serious procedural default where no sanction had been determined in advance, and as a result the Court orders that party’s pleading should be struck out under RHC O.2, r.1(2), which empowers the Court to set aside wholly or in part the proceedings in which the failure occurred. It is possible to argue that when the defaulting party applies for restoration of her case, the application should be considered in accordance with RHC O.2, r. 5.

---

<sup>29</sup> *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 3 All ER 365.

In England, the equivalent of RHC O.2, r.5 is CPR 3.9, which has been applied more widely. The English Court of Appeal held that the CPR 3.9 checklist should apply whenever the Court is considering any application for an extension of time if the refusal of such application would have serious consequences for the applicant. This approach was followed by Brooke LJ in *Sayers v Clarke Walker*, which concerned an application for an extension of time to appeal:

... it is equally appropriate to have regard to the check-list in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR 52.4(2), and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly 'imposed' by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed.<sup>30</sup>

But this view has been doubted in *Robert v Momentum* where Dyson LJ said:

I see no reason to import the rule 3.9(1) check lists by implication into rule 3.1(2)(a) where an application for an extension of time is made before the expiry of the relevant time limit. There is a difference in principle between on the one hand seeking relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing it has arrived. The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case. If the draftsman of the rule had intended that the checklist set out in rule 3.9(1) should be applied when the court is exercising its discretion under rule 3.1(2)(a) in such a case, then he could and, in my judgment, would have said so. By not spelling out a checklist in rule 3.1(2)(a), it seems to me that the draftsman was intending that the discretion should be exercised by simply having regard to the overriding objective of enabling the court to deal with cases justly including, so far as practicable, the matters set out in rule 1.1(2).<sup>31</sup>

Whatever the English position may be in this regard, it seems clear that the checklist of RHC O.2, r.5 does not apply to applications to vary the dates stipulated in a case

---

<sup>30</sup> *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645; [2002] 3 All ER 490; [2002] 1 WLR 3095 [21]. See also: *Woodhouse v Consignia plc* [2002] EWCA Civ 275; [2002] 2 All ER 737 (CA); *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888 (26 June 2003, unreported); *Short v Birmingham City Council* [2004] EWHC 2112 (QB).

<sup>31</sup> *Robert v Momentum Services Ltd* [2003] EWCA Civ 299; [2003] 2 All ER 74 [33].

management timetable since such variation is governed by RHC O.25, r.1B, as already explained. It follows that RHC O.25, r.1B will apply to most applications for extension of time to perform process requirements since the time for performance would normally be the time stipulated in a management timetable. The only way in which RHC O.2, r.5 may be brought into play would be by holding that the consequences of RHC O.25, r.1B amount to a sanction. Reverting to an earlier example, suppose the claimant has delayed in complying with an order for discovery for such a long time that giving her more time would require postponing the period in which the trial is to take place. This is something that the Court is forbidden from doing under RHC O.25, r.1B(7). The claimant could argue that the consequence of this provision amounts to a ‘sanction imposed for a failure to comply with any rule or court order’ within RHC O.2, r.5.

Such argument should, however, be rejected for two reasons. First, as a matter of statutory interpretation, the specific provisions of RHC O.25, r.1B, take precedence over the general provisions of RHC O.2, r.5, not to mention the general discretion to extend time under RHC O.1B, r.1(2)(a). As already explained, RHC O.25, r.1B is intended to provide a complete regime for dealing with the enforcement of the case management timetable which displaces, therefore, the general discretion under RHC O.2, r.5. Any doubt about this is removed if one looks at RHC O.2, r.5(h), which lists as a factor to be taken into account ‘whether the trial date or the likely trial date can still be met if relief is granted’, and compares it with RHC O.25, r.1B(7), which expressly states that ‘whether or not sufficient grounds have been shown to it, the Court shall not grant an application under paragraph (5) if the variation would make it necessary to change a trial date or the period in which the trial is to take place’. Plainly, the rule-maker did not contemplate that RHC O.2, r.5 can be engaged in a situation governed by RHC O.25, r.1B. The same is true of RHC O.25, r.1C, dealing with failure to appear at a case management conference or pre-trial review. Here, the rule does impose the sanction of striking out, but it goes on to make detailed provisions for how the action may be restored, which clearly leave no room for engaging O.2, r.5.

A further reason for holding that RHC O.2, r.5 does not apply to situations governed by RHC O.25, r.1B is that the rule does not create sanctions. Instead, it lays down conditions for obtaining extensions of time. It would make a mockery of the rule if these conditions were capable of being sidestepped by appeal to the discretion under RHC O.2, r.5. The requirements of showing ‘exceptional circumstances justifying the variation’, or merely ‘sufficient grounds’, can by no stretch of the imagination be regarded as sanctions. Such conditions merely give expression to the underlying objectives and have nothing to do with a claimant’s default.

It bears reiterating that the intention of RHC O.25, rules 1A, 1B and 1C is to establish a complete regime for case management, including the determination and variation of case management timetables, and that this regime excludes the more general discretion for dealing with non-compliance under RHC O.2, rules 4 and 5. It follows, therefore, that O.2, r.5 is fairly limited in application. It will apply to situations where the Court has made an ‘unless order’ stipulating the consequences of non-compliance, or where a rule stipulates the consequences of non-compliance. Given, however, the detailed provisions

of RHC O.25 it will be rarely necessary to have recourse to ‘unless orders’ for the purpose of obtaining compliance because in many ways the RHC O.25 regime is self-regulating.

The limitation on the scope of RHC O.2, r.5 is the most significant difference between the English and Hong Kong positions and one which gives the Hong Kong reform a much better chance of success than that achieved by the English reform. In England, the exercise of the jurisdiction under CPR 3.9<sup>32</sup> has undermined effective case management. CPR 3.9 requires a court considering an application for relief from sanction to take into consideration nine factors listed in the rules. Since the CPR does not provide a detailed and complete regime for dealing with applications to vary the case management timetable, CPR 3.9 applies to such applications. The English Court of Appeal held that none of the factors listed in CPR 3.9 has precedence over any other, that none carries special weight, and that, therefore, each of the nine factors must be taken into consideration. The need for detailed analysis of the implications of each of the nine factors mentioned in CPR 3.9 creates a potential for a lengthy and involved process concerning compliance.<sup>33</sup> After the Court has given careful consideration to each factor it has to ‘stand back and assess the significance and weight of all relevant circumstances overall, rather than to engage in some form of “head-counting” of circumstances’.<sup>34</sup>

The English Court of Appeal has declined to articulate general standards applicable to applications for relief from sanctions under CPR 3.9. Yet some aspects of this jurisdiction cannot be left hanging up in the air. For instance, it is necessary to have some idea about the significance to be attached to the lack of any reasonable explanation for a default. Similarly, it is necessary to have some idea of the importance that the Court should attach to the interests of the administration of justice generally and to the need to husband court resources for the benefit of all litigants. A rational allocation of court resources would allow some slack for rescheduling cases that could not be heard at the appointed time due to some unavoidable cause, such as the sudden illness of a legal representative or a key witness. But a rational allocation will not make concessions to litigants who, for example, fail to appear at a hearing without good reason.

By contrast, the Hong Kong rule-maker has made clear policy decisions and crafted a detailed and well-balanced system implementing them, principally in RHC O.5, rules 1A to 1C. The rule-maker implicitly accepts that denying a defaulting party a further slice of the Court’s time (by refusing to postpone the trial date) is merely a consequence of fair resource allocation. Justice is a finite commodity that has to be distributed fairly amongst all. A litigant who decides to go on holiday rather than take his day in court is no more entitled to another court day than a person who has gambled away her social security subsistence support. Access to court is a right, which like all other rights, has limits. A litigant is not entitled to more than his fair allocation of court resources, unless there is a good reason for exceeding the limits. A litigant who has been prevented by circumstances beyond her control

---

<sup>32</sup> The English counterpart of O2, r5.

<sup>33</sup> See, for example, *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801.

<sup>34</sup> *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801 [20]

from complying with a deadline deserves another opportunity but not a litigant who has had ample opportunity to comply but has failed to do so for no good reason.

Finally, considerations of fairness between the parties point in the same direction. A litigant who has complied with the case management timetable has a legitimate expectation that her opponent should do the same so that the litigation may be concluded within the original time frame set by the Court. To allow the opponent to drag out the process for no legitimate reason is to disappoint the non-defaulting litigant's expectation of expeditious adjudication. If the objective of ensuring that a case is dealt with as expeditiously as is reasonably practicable is to mean anything, it must mean adjudication within the framework of the case plan laid down by the Court.

## VII. CONCLUSION

The CJR amendments to the RHC have brought into existence a radically different litigation culture. The novelty is not so much in the discrete processes involved; commencement, pleadings, discovery, witness statements, expert reports and the like remain largely the same as before, although some significant improvements have been introduced here too. The really radical departure from the past is reflected in the control of the litigation process. Unlike in the past, the Court now controls the process through an extensive array of case management powers. The exercise of these powers is guided by the underlying objectives, which broadly speaking require the Court not only to adjudicate the substantive issues in dispute but also to do so with reasonable expedition and proportionate use of public and private resources. The underlying objectives do not speak only to the Court; parties and especially their lawyers are also under a duty to assist the Court to further these objectives.

The underlying objectives represent a new and multi-dimensional concept of justice with far-reaching consequences for the Court's task. Since the Court is no longer exclusively concerned with deciding cases on the merits, its task is now much more complicated since it must make managerial decisions involving careful balancing between the three imperatives of effectiveness, efficiency and fairness. The Court is required to take stock at an early stage of the nature of the individual dispute and its needs and lay down a case management timetable for the completion of the pre-trial processes. This litigation plan has to be case-sensitive to ensure that the management directions are appropriate to the nature of the dispute in question and its factual and legal features.

To ensure that unlike in the past the parties comply with the management timetable, the rule-maker has laid down detailed provisions about the circumstances in which departure from the time directions will be allowed. These clearly mark a determination not to tolerate party failure to comply with deadlines when there are no good reasons for the default. It seems quite clear that a party who has no excuse for missing a crucial deadline may well not get another opportunity for complying, especially if this will require postponement of the trial or of the trial period.

Excellent as the new system of court controlled litigation is, it has yet to be tested. Much will now depend on the resolve of the judiciary to enforce case management directions and deadlines. The English court found it difficult to withstand the temptation of allowing litigants further opportunities to comply even after numerous inordinate and inexcusable delays. It relied only too often on the discretion to grant relief from sanctions, which in Hong Kong is to be found in RHC O.2, r.4 and r.5. As a result, enforcing compliance in England and Wales has become problematic, time consuming and liable to produce expensive satellite litigation.

The flaws of the English court's approach to management have been recently discussed by Lord Justice Jackson in his *Review of Civil Litigation Costs: Preliminary Report*, where he reports:

1.4 The majority of practitioners, judges and regular court users comment that a fundamental and welcome change has been enacted in the way that litigation is conducted and controlled. However, a general theme from the Phase 1 submissions and from the meetings that I have attended is that the court could, and should, do more [to] actively to manage cases and to exert greater control over the conduct (and therefore the costs) of proceedings ... Several suggested that the appropriate framework already exists within the CPR but it is not implemented properly or consistently.

1.5 The majority view seems to be that pro-active management is the key to proportionate costs i.e. prevent the costs from being incurred in the first place. Suggestions as to how this can be achieved include:

- More effective use of sanctions and greater use of interim payments of costs.

...

- Increased use of specialist judges who, due to their expertise in dealing with a specific type of case, are more likely to intervene robustly to control costs. Those who deal with specialist judges note a marked difference in case management.

...

2.15 It is noted in several of the submissions that the court tends to shy away from implementing the various weapons in its armoury. Several respondents believe that if these powers were utilised more rigorously, then costs could be controlled to a proportionate level. These existing powers should be borne in mind when considering the possible reforms set out below.<sup>35</sup>

The CJR have enacted a rule which is absent in the English CPR. RHC O.1A, r.2(2) states that in 'giving effect to the underlying objectives of these rules, the Court shall

---

<sup>35</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, Vol. 2, Ch. 43 (May 2009).

always recognise that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.’ This is a beguiling discretionary power. It would be only too easy to say that by denying a party permission to disturb a milestone date the party would be denied resolution in accordance to his substantive rights and, therefore, the milestone date should be abandoned. If the Court were to give in to this siren song of justice on the merits, it would be undoing the good work of the CJR. It would thereby be reverting to the pre-CJR situation where deadlines were not taken seriously and where parties could disrupt the Court’s time table and deny their opponent adjudication within reasonable time. As already explained, there is nothing wrong, cruel or unreasonable for the Court to signal to litigants that litigation is governed by rules, that if the rules are reasonable, and the litigants have been given adequate time and opportunity to comply with the rules, they will not be given a further chance to do so, unless they are prevented from complying by circumstances beyond their control. Only by holding this line would the Court be able to make the CJR a success.