Editor's Note

Civil Litigation: a Public Service for the Enforcement of Civil Rights

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The eighth anniversary of the introduction of the Civil Procedure Rules 1998 (CPR) will take place in April of this year. It is therefore appropriate to ask whether the new procedure has been successful in achieving its main objective: to deliver a better civil dispute resolution service through a court-managed litigation process.

Lord Woolf, whose inquiry led to the enactment of the CPR, identified one fundamental defect in the old system: a lack of proper management of litigation. In those days the parties controlled the pace and intensity of the litigation process with scant regard to time limits or to court resources, while the court felt obliged to tolerate the situation. Litigant defaults encouraged complaints by opponents and resulted in disputes about process, which could consume considerable litigant and court resources. These in turn created a voluminous body of case law dealing with the exercise of judicial discretion in enforcing compliance with rules and court orders. Thus, an application to strike out a claim for want of prosecution could require the consideration of extensive case law and lengthy hearings. The scope for wasteful and costly satellite litigation on matters of procedure was therefore very substantial. Litigants seeking court adjudication were unable to predict in advance whether their case would proceed expeditiously and at a proportionate cost or whether it would be subject to lengthy delays and expensive interlocutory activity. To assess whether litigants are better off under the CPR, we need to know whether these unfortunate features of the pre-CPR era have been eradicated.

It was recognised from the outset that in order to ensure that cases are resolved by appropriate and proportionate means, the court must have the means:

> ''to ensure that the limited resources available to the courts can be deployed in the most effective manner for the benefit of everyone involved in civil litigation'' (*Lord Woolf, Access to Justice—Interim Report 1995*, Ch.5, s.1).

Lord Woolf's principal conclusion was that:

> ''there is no alternative to a fundamental shift in the responsibility for the management of civil litigation in this country from litigants and their legal advisers to the courts'' (*Interim Report*, Ch.5, s.2).

The chief measure adopted by the CPR in order to cure the former defects was therefore to transfer the control of the process from the parties to the court so it may ensure that the dispute is dealt with by a process that is appropriate and expeditious given the needs of the case in hand.

From the start it was recognised that management is the key factor. However, the implications of what effective management entails have yet to be recognised and implemented in practice. First and foremost, it remains to be accepted that court adjudication is a public service which, like all other services, has to be delivered to satisfy the reasonable demands of members of the public. Citizens are entitled to expect the state to provide a law enforcement service capable of determining their rights with reasonable accuracy, at a proportionate and predictable cost, and within a reasonable amount of time.

This expectation is founded on the constitutional entitlement to state enforcement of rights. It is important to stress that court adjudication of civil claims is not merely one of many equally satisfactory forms of dispute resolution. Rather, it is one of the pillars sustaining the rule of law. If dispute resolution were all that litigants sought, ADR would indeed offer an adequate substitute to expensive court proceedings. But this is not the case. A pedestrian injured by a speeding car, for example, does not go to court asking the judge: ''Please resolve my dispute with the speeding driver.'' Such pedestrian demands what is lawfully due to him or her. As right-holders, we are entitled to insist on the enforcement of the rights that we possess under the law. No one thinks of the criminal trial as merely a dispute resolution process because the criminal process is perceived as a law enforcement process. Yet, the civil process is equally a law enforcement process, and just as important to the maintenance of a society governed by the rule of law.

Subject matter apart, the difference between criminal civil law enforcement concerns the nature of the relationship between the parties and their status in the process and outside it. The civil process involves parties whose interests are broadly symmetrical, and who are free to choose whether to litigate and what to litigate. If they choose to demand court enforcement of their rights, they are entitled to expect an adequate law enforcement service. True, court adjudication is not the only law enforcement mechanism available. There are informal mechanisms through which one may obtain satisfaction. However, the right of access to justice entitles citizens to demand court enforcement if they have a real grievance and if they are not prepared to put their trust in any alternative.

The right of access to court does not, however, entitle litigants to demand the best possible law enforcement process regardless of cost, any more than they are entitled to demand unlimited health support or boundless educational facilities. The only reasonable demand that members of the community can make with respect to any public service is that its funding should be commensurate with available public resources and with the importance of the benefits that it has to deliver. In addition, members of the community have a right to expect that, within available resources, the service should provide adequate benefits to the community.

The test of whether a given public service is adequate is fairly straightforward. A public service is adequate if it is effective, efficient and fair. A service is *effective* if it meets the reasonable expectations of the community, be they appropriate health services, a satisfactory education system or, indeed, adequate court assistance for the enforcement of rights. A service is *efficient* if its resources are used to maximise benefit output and are not unnecessarily wasted on unproductive activities. A service is *fair* if the resources available to it are justly distributed between those entitled to the service, whether their needs are present or merely contingent.

The requirements of effectiveness, efficiency and fairness are easily translated to the provision of court dispute resolution. Court adjudication is effective if it determines claims with reasonable accuracy, within a reasonable time, and with proportionate investment of litigant and public resources. Court adjudication is efficient if public and litigant resources are employed to maximise effectiveness and are not wasted unnecessarily. Lastly, court adjudication is fair if the system ensures that its resources and facilities are justly distributed between all litigants seeking court help and between present and future litigants.

While these observations reflect the obvious, their practical implications for court adjudication do not seem to be universally appreciated. Many seem to assume that the civil justice system can be run without strict managerial insight of the adjudication process. Of course, it has always been accepted that some aspects of the court service have to be managed, such as court registries. However, there is considerable reluctance to accept that the judicial process also needs to comply with the kind of managerial parameters applicable to every other service.

The need for efficient use of court and litigant resources is reflected in the overriding objective of CPR r.1. Dealing with cases justly includes the following: saving expense; dealing with the case in ways which are proportionate to the amount of money involved to the importance of the case and the complexity of the issues; ensuring that the case is dealt with expeditiously; allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. These aims of judicial case management clearly reflect the requirements that adjudication should provide an effective protection of rights (i.e. reasonable determination of the issues, at proportionate cost and in a reasonable amount of time), that it should be efficiently delivered (i.e. avoiding waste of court and party resources) and that court resources should be fairly available to all who may require court assistance.

The need for an effective, efficient and fair litigation service began to enter judicial concerns even before it was formally endorsed in the Practice Direction issued on January 24, 1995 by the Lord Chief Justice and Sir Richard Scott V.-C. ([1995] 1 W.L.R. 508), which called for tighter court control of litigation and stricter adherence to timetables and court directions. In *MGN Pension Trustees Ltd v Invesco Asset Management Ltd*, Lexis, December 20, 1993, the Court of Appeal refused leave to appeal from a decision refusing the amendment of pleadings. Henry L.J. stated:

> ''In a case such as this the trial judge's task is not only judicial but also managerial. The managerial responsibility is considerable, with the overall costs budget in millions. Consequently, that function is very important in an age where litigation of all sorts at every level is too expensive because unnecessarily long. So judges are not only entitled but encouraged to be pro-active in their trial management and interlocutory appeals are consequently discouraged.''

In *Thermaware v Linton*, Lexis Transcript, October 17, 1995, Sir Thomas Bingham M.R. spoke of a:

> ''growing recognition that the luxurious approach to the expenditure of court time which was indulged in the past is something which, in the interests of litigants as a whole, simply cannot be any longer afforded.''

The implications of this outlook were spelt out by Waller L.J. in *Worldwide Corp Ltd v GPT Ltd* [1999] C.L.Y. 499 (CA), who described the erstwhile practice of allowing late amendments as follows:

> ''. . . in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) 'mucked around' at the last moment. Furthermore, the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.''

Soon after the CPR came into force, Chadwick L.J. explained in *Barnes v Uttlesford DC*, unreported, October 12, 2000 at [23] that:

> ''. . . the proper administration of these courts, in the interests of all those who wish to use them, requires that matters listed to be heard are, if possible, heard at the time for which they are listed. It is not possible for this court to provide a service whereby litigants can come in at whatever time happens to suit their convenience. That would be a recipe for chaos.''

In *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 W.L.R. 954 at [25], Lord Woolf C.J. stressed this point when he said:

> "A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Part 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (CPR Part 1.1(2)(e)). Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the Court, it is also concerned with litigation as a whole."

The thinking behind the CPR has been set out by Brooke L.J. in *Thomson v O'Connor* [2005] EWCA Civ 1533 at [17]:

> "The Civil Procedure Rules, with their tough rules in relation to requiring compliance with court orders, were introduced to extinguish the lax practices which existed before those rules were introduced whereby parties' solicitors often regarded directions given by the court as so much waste paper, extended time unilaterally without approaching the court, reached agreements allowing each other plenty of time without approaching the court, and made it virtually impossible for courts to organise their lists effectively."

In the recent case of *Sutradhar v Natural Environment Research Council* [2006] UKHL 33; [2006] 4 All E.R. 490, the claimants, who were residents of Bangladesh, alleged that their injuries, resulting from drinking water contaminated with arsenic, were caused by the defendants' breach of duty in implying that the water was safe to drink. The issue before the House of Lords was whether it was justified to give summary judgment against the claimants on the grounds that they had no real prospect of succeeding. Endorsing the decision to dismiss the claim summarily, Lord Hoffmann said (at [42]):

> "The overriding objectives of the Civil Procedure Rules include achieving justice for both claimants and defendants and saving time and expense. These objectives sometimes conflict and compromises are required. It is not the case that the administration of justice, alone among the services provided by the state, is exempt from any considerations of cost. It is obvious that a trial of this action, involving an examination of the water resources programme in Bangladesh over a number of years, would be an enormous and expensive undertaking. Your Lordships were told that the costs incurred in these proceedings by the claimant and other residents of Bangladesh who wish to bring similar actions, at the expense of United Kingdom public funds, already exceed £380,000. That takes no account of the costs incurred, also at the public expense, by NERC. That is a factor which, however unpalatable it may be to those who think that justice is priceless, must be taken into account. And justice to the defendant

> requires one to have regard to the burden which a long and complicated trial would impose upon NERC. Speaking for myself, I think that even if the resources of the state and NERC were infinite, it would still be wrong for this case to proceed to trial. But when one considers the scale and cost of a trial, the case for stopping the proceedings now appears to me to be overwhelming.''

This dictum reflects a growing recognition that the delivery of civil justice must accommodate itself to considerations of efficient use of resources, just as does every other single public service. Unfortunately, there remains a considerable gulf between the abstract acceptance of the need for effective, efficient and fair delivery of an adjudication service and the court's ability to fashion its practice so as to be able to achieve these aims.

The topic of summary judgment, in relation to which Lord Hoffmann made the above remarks, illustrates a judicial ambivalence when it comes to efficient use of court and litigant resources. The summary judgment procedure is not new. English law has evolved this procedure to enable litigants with a clear and unanswerable case to obtain judgment without having to negotiate the normal procedural hurdles. However, its use prior to the CPR became very restricted. Quite apart from the fact that it was only available to claimants, an applicant had to show that the defendant had ''no defence'' to the claim (RSC Ord.14, r.1(1)). This was interpreted as requiring claimants to produce a case strong enough to leave the court with ''no reasonable doubt that a plaintiff is entitled to judgment'' (*Home and Overseas Insurance Co v Mentor Insurance Co (UK) Ltd (in liquidation)* [1989] 3 All E.R. 74; [1990] 1 W.L.R. 153). It was therefore not enough for the court to merely conclude that the defendant was unlikely or even highly unlikely to succeed in his defence. Since the absence of a defence had to be established beyond reasonable doubt, leave to defend had to be given even where the defence was very weak, or ''shadowy''.

The CPR departed from that strict test and replaced it with a test of a ''real prospect of succeeding'' in supporting or defending a claim. This was no mere change in terminology. The intention was to make it easier for applicants to satisfy the test for summary judgment (Lord Woolf, *Interim Report*, Ch.6, para.21). What lay behind the new test was the belief that the employment of the normal process should be side-stepped where it could make no useful contribution to the just determination of a dispute, over and above what could be achieved by a simple early hearing. Put differently, the court should not waste its scarce procedural resources dealing with claims or defences that would have no better prospect of success if they proceeded to trial.

However, cases such as *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Com 100 Ltd* [2006] EWCA Civ 661 demonstrate the court's resistance to implementing efficiency imperatives. The Court of Appeal was hearing an appeal against summary judgment in intellectual property litigation. It was argued that a summary judgment application is best determined by a judge with specialist knowledge of intellectual property law. However, Mummery L.J. rejected this suggestion, saying that:

> ''the decision whether or not an action should go to trial is more a matter of general procedural law than of knowledge and experience of a specialised area of substantive law. All judges, specialist and non-specialist, are experienced in procedure and practice. Procedural justice is the judicial specialisation par excellence. It may take a little longer for the application to be opened to a non-specialist judge, but that may be no bad thing. I am confident that all judges to whom such applications are likely to be made will have the necessary procedural expertise to sort out those cases that can properly be disposed of without a trial'' (at [8]).

This view suggests a quite different understanding of the nature and purpose of the summary judgment procedure from that which lay behind the enactment of the CPR. As already explained, the aim of this procedure is to avoid the need for the full pre-trial and trial processes when one of the parties has no real prospect of success. That is, to avoid investing any further process resources when the court can safely decide the case on the material before it at the summary judgment application. Whether the court could safely decide at this early stage must inevitably depend on the knowledge and experience of the judge hearing the application. Clearly, a judge with little experience of intellectual property litigation would hardly ever feel confident to decide a case of any complexity on a summary judgment application. Any doubt in the judge's mind would make the judge uncomfortable to dispose of the claim or defence and would inevitably lead to sending the case to trial so that it may be decided by specialist judge. An inexperienced judge would be able to dispose summarily of a case only where it would be clear to any judge that the claim or defence is wholly without foundation. This effectively reduces the test from a ''real'' prospect of success, to the absence of an ''arguable case''. This in turn would inevitably result in sending hopeless cases to trial and wasting the scarce resources of the specialist court. It is therefore difficult to see how any judge, other than a specialist intellectual property judge, can adequately decide whether there is a ''real'' chance that a trial in the specialist court would produce a different result.

Mummery L.J.'s view appears to be founded on the assumption that litigants have a basic right to be allowed to take their case all the way to trial, except where their claim or defence has no merit whatsoever. This assumption led the House of Lords to overrule the summary judgment in the *BCCI* litigation, which in turn led to a monumental waste court and litigant resources (see ''A Colossal Wreck—the BCCI-Three Rivers Litigation'' (2006) 25 C.J.Q. 287). If resources are to be adequately husbanded, the summary judgment jurisdiction must be exercised by judges who have the necessary qualifications to determine whether it is safe to dispose summarily of the case.

The belief that litigants are entitled to have their cases tried regardless of resource considerations has had far-reaching consequences to the success of the CPR in other areas too. In particular, it has hampered the court in enforcing compliance with deadlines for the performance of process requirements. Compliance with rules and court orders, just as compliance with any other norms, is determined by the effectiveness of the methods for dealing with

defaults, which is in turn influenced by the extent to which the consequences of any failure to comply are predictable. Sadly, the CPR has failed to provide credible and predictable machinery for enforcing compliance.

Part of the blame lies with the CPR itself. CPR r.3.9, which deals with the exercise of the power to grant relief from sanctions, has impeded the court's ability to manage cases efficiently because it creates an inherent uncertainty about the consequences of any default. It has been held that all nine factors listed in the Rule (and any other relevant factor) must be taken into account when determining the consequence of any process default. It has also been decided that no one factor has precedence over any other factor. This leaves the court with almost unfettered discretion, for it stands to reason that the longer the list of considerations that must be taken into account, the less each of them is likely to count and the more open-ended the court's freedom will be. Furthermore, it would appear that the checklist factors of CPR r.3.9 have themselves become a source of dispute and satellite litigation.

There are worrying signs that many of the old features, such as lax enforcement of time limits and costly litigation about process, are returning to haunt the system. This is not entirely surprising since the court's attitude to process defaults inevitably influences the attitude of practitioners and parties to their compliance obligations. The fact that there is always a real possibility of obtaining a further chance for compliance has undermined the normative force of time limits and has encouraged sloppy practice and litigation about compliance with the result that the best-laid management plans may be thwarted.

Good management requires that once the court has given case management directions, the parties should be expected to comply, since the directions represent the appropriate allocation of resources to the case in hand. Of course, the court possesses the managerial flexibility to adjust its directions to any fresh developments and accommodate parties that have been prevented from complying by circumstances beyond their control. But the court breaks good management principles if it allows parties to depart from the directions for no good reason. It is therefore suggested that CPR r.3.9 and the court's approach to it are incompatible with the overriding objective which calls for efficient use of court resources.

The idea that without good reason a litigant should not be given a second chance is hardly new. It is, for example, reflected in CPR r.39.3, which provides that where a party fails to attend a hearing the court may give judgment or make an order against him or her. The absent party may apply in such cases for the judgment to be set aside. However, CPR r.39.3(5)(b) provides that such application would be entertained only if the applicant ''had a good reason for not attending the trial''. Thus the rule-maker recognises that without a good reason for the absence there can be no justification for holding a fresh hearing or trial. Yet, the same is true of any other process. If a litigant had an adequate opportunity to comply with a process requirement, there seems little reason why he or she should be given a second opportunity, let alone a third or fourth. If management directions were just and appropriate when made and the consequences of non-compliance were known in advance,

the court should be duty-bound to enforce the consequences, unless there has been a good reason for the default. The adoption of such principle is essential to the court's ability to deliver an effective, efficient and fair law enforcement service.