Discuss woolf reforms effect on civil justice law essay

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This essay will seek to analyse the Woolf Reforms and in that context will evaluate the overall qualitative impact that they have had on the Civil Justice system. The essay will discuss the background in which Woolf Reforms were passed, the Woolf Reforms, Impact/intention of the reforms, Objective analysis based on criticism (positives and negatives) and finally the essay will conclude by analysing whether the Woolf Reform has actually succeeded in its definitive goal of reducing cost and delay.

Background

In 1995 there was a survey carried out by National Consumer Council[1]which found that 3 out of 4 people who are involved in serious legal disputes were dissatisfied with the civil justice system. It was found that of the 1, 019 respondents, 77 percent believed that the system was too slow, 74 per cent stated that the system was too complicated and 73 per cent said that it was unwelcoming and outdated.[2]

A cursory look at history reveals that Pre-Trial process has been the subject matter of numerous reports and inquiries. Since 1968 there has been the Winn Committee[3], the Cantley Committee[4], the massive Civil Justice review 1985-1988[5]and the Heilbron-Hodge Working party jointly set up by the Bar and the Law Society[6]. These are outside the purview of this Essay as the new system of Civil procedure took effect on the basis of the recommendations made by Lord Woolf in his June 1995 Interim Report[7]and his July Final report, both of which are entitled ‘ Access to Justice’[8].

Senior members of judiciary have always boldly defended the significance of civil justice and were concerned about the degradation and the problems inflicting the civil justice system[9]. Genn further stated that he was aware of the sorry state of the civil courts[10]. It was in this background of continuous criticism that the previous Conservative Government appointed Lord Woolf to carry out a far reaching review and overhaul the civil justice system. His inquiry is the 63rd such review in the past 100 years[11]. The 3 perennial problems of cost, delay and complexity have plagued the civil justice system for ages and it was these ills that the Woolf reforms sought to redress[12]. Indeed, the whole ethos of civil justice is bound to fail if litigation which in itself is a costly affair cannot provide timely, less expensive and simple justice.

Lord Woolf wanted to eliminate the defects in the civil justice system which were identified as being: too expensive, too slow, lacking equality between powerful and wealthy litigants and under-resourced litigants, too uncertain in terms of the length and cost of litigation, too fragmented and too adversarial[13].

Therefore it was in this light that in March 1994, the Lord Chancellor set up the Woolf enquiry whereby ways of reducing delays and improving accessibility of civil proceedings, and of reducing their cost were to be found[14]. On 26th April 1999 New Civil Procedure Rules and the accompanying Practice Directions came into force. These rules constitute the most fundamental reform of the civil justice system in the 20th century, introducing the main recommendations of Lord Woolf's final report. He described his proposals as providing ' A new landscape for civil justice for the 21st century'[15].

Woolf Reforms- The need for reform

The whole ethos of the Woolf reforms is woven around avoiding litigation and promoting settlement between parties[16]. While it shall be analysed in detail whether the much needed reforms fulfilled their purpose or not, it can be stated in the affirmative that the Reforms were very well received by various quarters of the legal profession[17]. However, the reforms have not escaped criticism and one of their outspoken critics is Michael Zander.

The inquiry by Woolf published its final report in 1996 and thereafter the proposals resulted in the Civil Procedure Act 1997 and the Civil Procedure Rules 1998, which are the same[18]for the County court and High Court. It needs to be clarified here that the changes sought by Woolf Reforms bear effect primarily through the Civil Procedure Act 1997 and the CPR 1998, although these have been supplemented by new practice directions and pre-action protocols[19].

Lord Woolf, when he began his examination of the Civil law process identified diverse problems[20]. His interim report of June 1995 sates that ‘ the key problems facing civil justice today are cost, delay and complexity, these three are interrelated and stem from the uncontrolled nature of the litigation process. In particular there is no judicial responsibility for managing individual cases or for the overall assessment of the civil courts’[21]. Heilbron Hodge, who called for a ‘ radical appraisal of the approach to civil litigation form all its participants’, paved the way for Woolf report and accompanying reforms . It was forewarned[22]by Lord Woolf that without effective judicial control the adversarial process of the civil courts was ‘ likely to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply’ immediate effect of which would be disproportionate expense and unpredictable delay[23].

Being conscious of all these problems, Lord Woolf envisaged a New Landscape for Civil justice which included: Litigation will be avoided wherever possible, litigation will be less adversarial and more co operative, Litigation will be less complex, the timescale of litigation will be shorter and more certain, the cost of litigation will be more affordable, more predictable, and more proportionate to the value and complexity of individual cases, parties of limited financial means will be able to conduct litigation on a more equal footing, there will be clear lines of judicial and administrative responsibility for the civil justice system, Judges will be deployed effectively so that they can manage litigation in accordance with the new rules and protocols, the civil justice system will be responsive to the needs of litigants. [24]

For paucity of space I shall be discussing the main reforms that have an immediate effect on cost and delay: Pre-Action protocol, Part 36, Judicial Case Management and ADR. These were the brainchild of Lord Woolf, in this context I will compare Judicial Statistics as regards the impact of these reforms and will also evaluate the criticisms meted out to these reforms from various quadrants. The proposed objective of all these reforms was to encourage settlement, avoid litigation, encourage parties to be less adversarial, more cooperative, reduce complexity of litigation, reduce delay, and reduce cost.[25]It is but utmost important to discuss the reforms to see whether these objectives have been met or not.

Pre-action Protocols

The idea was pioneered by Lord Woolf and can be considered as one of the most important innovations of the Woolf Reforms. Pre-action Protocols focus on the conduct of parties in the pre litigation stage which will be taken into account by the courts both during the case and also towards the end when the final decision regarding allocation of costs is taken. Pre-action protocols serves an effective means to this end as they are accompanied by the practice directions which describe their chief objective as encouraging exchange of early and full information about the prospective claim, avoiding litigation by promoting settlement and where litigation emerges as the last resort, to support its efficient management[26]. It was stated by Lord Woolf in the Final report on Access to Justice (1996) that Pre-action protocols are intended to ‘ build on and increase the benefits of early but well informed settlements’[27]. Clearly one can say that if parties know everything before hand, it does promote a healthy environment by way of co-operation and the

civil litigation process can be avoided. There have been 9 pre-action protocols produced so far covering vast areas of practice such as personal injury, medical negligence and housing[28]. By 2003 they also existed for construction and engineering, defamation, professional negligence and judicial review.

The purpose of these protocols was to[29]set down pre-court procedures, encourage good communication and early settlement. Further these protocols cast a duty on the claimant to give the defendant details of the claim and on the other hand the defendant must respond to these claims within a stricter period of time. The protocols state that the key documents on which the party's case wholly rests must be disclosed at an early stage. Both the defendant and the claimant must agree on the use of an expert witness where relevant. If the parties fail to comply with these pre-action protocols the immediate result is penalty whereby the party at fault must pay some or all costs of the proceedings.[30]Claims however, should not be issued until at least three months after the initial letter of claim wherein the claimant has written to the prospective defendant disclosing his claim[31].

Evaluation/impact of the protocols will be carried out in the next section but it should be mentioned here that although pre action protocols may be expensive and can lead to front loading of costs in cases which would settle without them, they might be able to prevent the unnecessary costs of issuing proceedings and listing for hearing in the same cases. Another benefit that follows from the protocols could be that they might give the parties a healthy nudge towards Alternative Dispute Resolution[32].

Part 36: An Innovative Approach

The Woolf Reforms instituted Part 36 which provides greater incentives for the parties to settle their differences mutually. Under Part 36 procedures exist for either party to make an offer to settle their disputes and these were significantly revised with effect from 6th April 2007. Now a part 36 offer can be made before the proceedings start as well as in the appeal proceedings. In this regard ‘ Offeror’ refers to the party making the offer and the ‘ Offeree’ is the one receiving it. Upon acceptance of an offer by the claimant a duty is cast on the defendant to pay the sum offered within 14 days, failure to do so would allow the claimant to enter judgement. Also, any pre- action offer to settle while making an order for costs will be taken into consideration by courts. A side refusing it will be treated less generously and this usually applies to offers which are open to the other side for at least 21 days after the date they were made. Lord Woolf suggested that for a settlement offer to qualify as an offer under Part 36 it must be made in writing with the intention to have the consequences of part 36. As regards Defendant making the offer, a period of not less than 21 days must be specified whereby the defendant’s liability for claimants will be established if the offer is accepted. Under the revised Part 36 however, any offer may be withdrawn after the expiry of the ‘ relevant period’, as defined in Rule 36. 3. 1. c, without the court’s permission[33].

Michael Zander states that when the defendant pays a sum of money into the court account as an offer of settlement, the case would end upon acceptance of the money. However if the offer is refused by the claimant, the defendant can still increase his payment-in. Upon further refusal the case

will go to trial and the outcome will be determined by the court. If the Claimant does not recover more than the amount paid in, the court will order him to pay the cost of both sides from the date of payment-in. It would be worth mentioning Calderbank letters here because technically the system applies only to cases which concerned damages or other money claims whereas under these letters if the defendant makes an offer of settlement ‘ without prejudice save as to costs’ it would virtually be treated by the courts in the same way as if it was payment into court. Pre -CPR this rule 36 was applied inflexibly. Post 1999 the courts are able to mitigate the harshness of the traditional rule where the claimant was automatically ordered to pay the cost of both the sides upon failure to secure more than the amount paid in by the defendant. New rules now provide for the Claimant’s offer, which was considered to be a big change. For money claims Part 36 payments apply, however, where the claim is not monetary, the defendant can still make a part 36 offer (as opposed to part 36 payment) and thereafter the same basic rules shall apply. However the court’s discretion[34]applies. All in all allowing the claimant to make an offer of settlement under the CPR has proved to be a welcome step[35]. The analysis of Part 36 will be discussed in the next section.

Judicial Case Management: Striking a balance

This is the most significant innovation as it was perceived by Lord Woolf that case control by judiciary, rather then leaving the conduct of the case to the parties, will bring the cases to trial quickly and efficiently[36]. It can be seen that the litigants in this new system will have much less control over the pace of the case than in the past. As the case is now subject to a timetable,

parties will not be able to draw out proceedings and cause delays. A positive duty is cast on the court which means[37]:

Civil Procedure Rules 1. 4(1) encouraging parties to co-operate with each other in conduct of the proceedings, identifying the issues at an early stage, encouraging parties to use ADR, helping parties to settle whole or part of the case. Under the CPR Cases must be assigned to 1 of the 3 tracks: small claims, fast track or multi-track, each having its own separate regime depending primarily on the financial value of claim[38].

Limit for small claims cases is £5, 000 except for personal injury and housing cases where it is £1000. Proportionate procedure is followed where straight forward claims with a financial value of not more than £5, 000 can be decided without needing substantial pre hearing preparation or formalities of substantial trial and also without incurring large legal costs[39]. These procedure under small claims are controlled by district judges on informal basis[40]. Cases involving amounts between £5, 000-15, 000 are dealt here unless they are deemed unsuitable. The fast track procedure incorporates a set timetable of no more than 30 weeks to trial, limited pre-trial procedures, trials restricted to no more than 3 hours (which was further extended to 5 hours), restrictions on oral evidence form experts and recovery of standard fixed costs[41]. Cases involving amounts exceeding the fast track limit or cases with lesser amounts which are considered complex or too important for small claims or fast track cases are dealt with here[42].

Evaluation of the impact of judicial case management on reduction in cost, delay and complexity will follow in the next section.

ADR, though not part of the traditional Court system, has been brought in connection through the CPR. Lord Woolf in his Final Report urged that people should be told and encouraged to resort to a growing number of grievance procedures, or the ADR before taking up legal proceedings. These ADR feature prominently in the rules and CPR 1. 4(1)[43]states that ‘ the court must further the overriding objective by actively managing cases’. However, Lord Woolf commented that ADR cannot be imposed compulsorily on parties at dispute in civil litigation[44]. There are no complex court procedures to be adhered to while using ADR and also it saves a lot of time and avoids ever escalating litigation costs.

Experts evidence was another area with which Lord Woolf was concerned. It was contended by him that expert evidence was a major cause because of which excessive expense, delay (in some cases) and complexity increased. He wanted to do away with the system where both the parties could appoint their own experts, rather he envisaged a single expert who would owe his allegiance to the court rather than to the parties. Given the criticism of his proposal he admitted that though a significant shift towards single experts is not immediately possible, nevertheless it was possible to initiate a shift in that direction[45].

Impact/Evaluation of the Reforms

Before evaluating the reforms it may be stated in the affirmative that the Overriding Objective of the new CPR was to enable the courts to deal justly with the cases. CPR rule 1. 1(1) reads: “ These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly”[46].

The combined effect of the major reforms was to avoid parties going to litigation and to promote settlement. This merit analysis based on empirical data wherein the major focus is to evaluate reduction in cost and delay. Early evidence reveals success on the part of these radical changes as, there was 25 % reduction in the number of cases issued in the county courts in May – August 1999 which in comparison to the same period in the previous year was much less. This further fell to 23 % by the end of January 2000. Lord Phillip stated that the reforms have proved to be effective in changing the whole ethos of litigation but litigation itself is still expensive. It was commented by Gary slapper et al that overall reforms can be seen as a triumphant step in the right direction as larger proportion of society is able to achieve greater access to justice especially when the issues at dispute are relatively small and can be dealt with quickly and cheaply in the small claims track. However, the reforms do not fare that well where complex commercial disputes are concerned.[47]

As a result of the reforms many positive changes have occurred, the culture has become less adversarial, there is better exchange of information between the parties before the start of litigation and settlement now focuses on the substantive issues in the case[48]. ‘ Cards on table’ culture, as it can be called, is a major factor leading to settlement. Communication and exchange of information at an early stage always help[49]. Furthermore, claimant offers under Part 36 were praised as claimants could now obtain a response from the defendant and defendants also benefitted from them as they could set upper limits to the bargaining. Protocols, by focussing on formulating clear ground rules on the basis of which claims are formulated

and responded to, encouraged parties to focus their minds on the key issues at an early stage[50]. File survey undertaken by Goreily et al revealed that median time in case of medical report to settlement had fallen from 170 days pre Woolf to 123 days post-Woolf, thereby reflecting that settlement has become quicker[51].

In case of large claims which were subject to court timetables, solicitors thought the speed has become quicker. As regards cost it was acknowledged that costs increased because of ‘ front-loading’ as now more work is required to be done during the initial stages[52]. Evidence regarding protocols suggested that it had some impact in reducing costs as earlier exchange of information could lead to speedier settlements because both sides become aware of the issues much sooner. Case management evaluation however, received a mixed response. Experience in relation to High Court Masters in London was perceived as positive and leading to a greater incentive to reach agreement before hearing. However, outside London the experiences were not that positive[53].

Judicial statistics reveal that the number of claims have fallen to less than 1, 90, 000 in 2005 as compared to 2, 20, 000 in 1998. All this has happened since the coming into force of the Woolf reforms, though favourable economic climate may also account for this[54]. Cases have diverted from being litigated in the courts as a result of the use of pre-action protocols and claimant offers under part 36 which encourage pre-trial settlements, causative effect being that only 8% of cases which are listed for trial settle during the course of trial and 70% settle much earlier. This is suggestive of the fact that the reforms have been a positive step towards out-of-court

settlements which have the advantage of providing a quick/speedy end to the dispute coupled with a reduction in costs[55]. First evaluation of the new Civil Procedure Rules by the Government[56]indicated the overall benefits of reforms whereby it was stated that cases are settling much earlier and not at the court's doorstep. Litigation is regarded as the last resort by lawyers and clients who now make greater use of ADR. Pre-action protocols were believed to be a success. All these findings are further supported by the latest research[57]into the civil justice system[58].

A major official study published by the institute of Civil Justice at the Rand Corporation in California (Kakalik et al, 1996) looked into the effect of American Civil Justice Reform Act 1990 based on a survey of 10, 000 cases. And found that early use of Judicial case management can yield reductions of one and a half or 2 months to resolve cases that would otherwise last at least 9 months. Discovery timetables further reduce time to disposition and also the number of hours spent by a lawyer working on the case. However one drawback is that case management will ultimately lead to an approximately 20 hour increase in lawyers' work overall[59].

Only 2 proper research studies on the impact of Woolf reforms have been there so far. The first one was carried out for the Civil Justice council and the Law Society (Goreily et al.')[60]on pre -action behaviour. The second for Department of constitutional affairs by Professors Peysner and Seneviratne[61]dealt with the case management[62]. It was contended on the basis of this second research that protocols generate co-operation, and help prepare cases in a organised way and also discussed widespread employment of single joint experts and that days of hired guns are over.[63].

It is important here to mention the benefits accruing as a result of the Woolf Reforms which have been validated from a variety of sources[64]:

Culture seems to be less adversarial which reflects a better future, Pre action protocols have received laudable applause, Part 36 offers and payments seem to promote healthy settlement, single joint experts seem to work better in contrast to views of critics.

Judicial Statistics reveal that average waiting time in county courts from issue of claim to trial has reduced form 85 weeks in 1998 to 52 weeks in 2005[65]. Analysing Statistics from Department of constitutional affairs, Reynolds Porter Chamberlin (RPC) a large city law firm found that in the first year of the reforms there was a 41. 3 % drop in cases being litigated and in the following 5 years(in 2005) it further declined to a drop of 1. 7%[66]. District Judge Terence John being sceptical however, stated that the reforms have changed the civil legal world for better and are here to stay. He further observed that 70 % of the claims are being dealt through the small claims track and 20 % through the fast track; all this makes recourse to justice realistic[67]. Also Judge Charles Harris QC commented, trials are held pretty briskly as a result of case management which restricts incompetent litigators to prolong the case.[68]

Criticism

A major criticism of the Woolf reforms was mounted by Zander who opined that there is immense pressure[69]on parties to enter settlement once the case begins. Empirical evidence suggests that it is not necessary that pre-trial hearing will reduce cost and delay[70]. Further report by T. Goreily et al

suggests that overall time before and after reforms have remained the same[71]. (However it may be stated, further empirical data on delay as a result of reforms a