Impact of woolf reforms on civil justice system law essay

The Woolf reforms have successfully increased access to justice for litigants despite being confronted with extensive variables and multifaceted difficulties. However, the reforms have failed in some major aspects, ultimately falling victim to the notoriety and reality of legal reform. The civil justice system and the Woolf reforms will firstly be discussed, moving into an analysis of the prominent areas of the Civil Procedure Rules, with the essay concluding with an overall analysis of the reforms, exposing the reasons for its failures, in reference to the reality of the civil justice system.

The Civil Justice System and the Emergence of the Woolf Reforms and Access to Justice

The civil justice system has the dual function of serving the public good and acting as a private means. Its social purpose is to provide the machinery for giving effect to the rights of citizens, whilst contributing to the social and economic well being of the community and regulating the exercise of executive power under the democratic principle of the rule of law. For these purposes to be fulfilled, there must be effective access to justice with an awareness of every citizen of their rights, entitlements, obligations and responsibilities, and of the procedures for redress. The underlying basis of the Woolf reforms is therefore to ensure that the justice system provides opportunities for the public to make good their rights.

An unambiguous aspiration to overhaul the justice system culminated in 1994, when the then Master of the Rolls, Lord Woolf, was appointed by the Lord Chancellor, Lord Mackay, to assess the practices and procedures of the civil courts in England and Wales. There was a four year, all-embracing inquiry and extensive consultation process that made over three hundred

recommendations designed to improve the limitations of civil litigation. There were two reports, published in June 1995 and July 1996, that revealed the findings of the wide-ranging inquiry and provided the foundation for the subsequent Civil Procedure Rules 1998. It is widely accepted that the perceived deficiencies of the civil justice system were met by proposals of radical change and the Woolf reforms were far more than a modification or clarification of the justice system.

This investigation into the country's legal system was required to maintain the integrity and political legitimacy of the system, preventing it from being brought into disrepute. The impact that the competency of a nation's justice system can have on considerations such as the economy and political presence in international affairs was also recognised. This is especially the case when identifying London as a prominent dispute resolution centre in the world, attracting litigants from across the globe. The reputation of England and Wales was assessed and the pre-Woolf litigation landscape was in need of reform if this historic justice system was to maintain its standing as one of the most competent providers of justice.

Findings of the Woolf Reforms

The perceived deficiencies revealed by Woolf's inquiries were readily agreed by the users of the civil justice system. In essence, litigation in England and Wales was too slow, too expensive and too uncertain. These injustices were predominantly identified to be the result of the English adversarial tradition and allowing parties to assume the proactive and dominant case management role, leaving the judiciary to perform simply a reactive role.

Too Slow

The pre-Woolf landscape contained too much delay that crippled the efficiency of the system and provided a disincentive to those seeking to enforce their rights. This introduced an additional cause of stress, such as through making it " more difficult to establish the facts" and leading " parties to settle for inadequate compensation".[1]Lord Woolf identified delay to be the direct result of the adversarial culture of litigation that lawyers practised within and thrived upon. The time taken to progress a case from an initial claim to final hearing was a matter of concern, especially in making litigation expensive.

Too Expensive

The ever-increasing cost of litigation was found to limit access to justice. However, for some academics, high costs do not automatically entail that low income citizens are prevented from participating in the justice process because of the existence of what Michael E. Stamp[2]has named the " fiscal illusion", where a belief arises that legal services are becoming unaffordable because they have increased in relative price. Stamp argues that " society must alter the proportion of income devoted to different goods and services" and rely upon increasing the productivity of legal services to match the increasing costs rather than solely aiming to decrease costs whilst maintaining current levels of efficiency. The Woolf reforms took on the dual approach of aspiring to increase the output of the justice system and endeavouring to strip away unnecessary costs. Stamp's comment is an understatement of how low income citizens are being priced out of litigation

and fails to stress the importance of access to justice for every citizen, irrelevant of social or financial status.

Despite the above debate, it is accepted that the cost of a claim is “ a barrier to some and a problem for all litigants”[3]and in more direct opposition to Stamp, Sir Thomas Bingham[4]robustly describes costs to be “ a cancer eating at the heart of the administration of justice”. The system was too expensive with patterns of costs being higher than the claim was worth. High costs act as a deterrent to those making and defending claims and “ a number of businesses say that it is often cheaper to pay up, irrespective of the merits, than to defend an action. For individual litigants the unaffordable cost of litigation constitutes a denial of justice”.[5]The primary intention to provide justice for individuals and businesses was being undermined by the inefficient cost of the machinery. This begins to expose the cruel reality of accessing justice that will run throughout this assessment of the Woolf reforms.

Too Uncertain

Uncertainty for litigants was a simple but significant limitation of accessing justice arising from unpredictable costs, timings and timetabling, and the uncertainty of judicial decisions. Uncertainty constituted a strong deterrent for litigants and must not be minimised as an issue.

The English Adversarial Tradition

There was a definitive intention to shift the litigation culture from that of adversarialism to compromise, co-operation and settlement. Woolf described the adversarial system as “ likely to encourage an adversarial culture and to

degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply".[6]There was a determination of lawyers to manipulate court procedures, delay and disrupt the opposition counsel, increase the costs of the litigation for personal profit and impose professional protectionalism. Woolf identified that " main procedural tools for conducting litigation efficiently have each become subverted from their proper purpose"[7]and " the powers of the court have fallen behind the more sophisticated and aggressive tactics of some litigators".[8]Lawyers were accused of abusing the disclosure of information, disputing unquestionable points, making tactical appeals and deploying tactics to drag out litigation, thereby driving up costs. Any analysis of this tradition identifies that the burden of this abuse falls on the client.

Woolf disclaimed any potential shift towards an inquisitorial system and abandoning adversarialism in its entirety, in order to maintain its benefits, such as its impartiality compared to inquisitorial techniques. The proposed reform of case management (as set out below), was therefore created to be compatible with the adversarial tradition, establishing conditions where it could survive the transfer of control from the parties to the judiciary.

Conclusion on the Findings of the Woolf Reports

The justice system was essentially failing the litigant, on and for whom the whole system should, in principle, focus and deliver. Fairness, speed of process, reasonable results and the availability of appropriate procedures were all found to be lacking within a system which promised all these goals. The impression of litigation is a fragmented, inefficient and incomprehensible

system failing to fulfil its function and its potential, to promptly distribute affordable and certain justice.

It is difficult to take issue with Lord Woolf's findings and the principles of reform that emerge from his conclusions. The reliability and diligence of the access to justice reports are uncontested and the research element of the reforms will continue to act as a valuable identification of the positives and, importantly, limitations of the civil justice system. In this facet of investigation and assessment, Woolf was undoubtedly successful.

However, the means and choice of initiatives that Woolf proposed to remedy the exposed limitations are open to debate and critique, particularly when commonly identified as being radical and controversial in their nature and the direction in which they attempt to guide the justice system.

Objectives of the Woolf Reforms

The aims of the reforms can be condensed into one overriding objective, set out in Civil Procedure Rules 1. 1, which was to increase the competency of the civil justice system to decide and deal justly the cases set before it. This includes such considerations as reducing excessive costs, ensuring cases are dealt with expeditiously, honestly and in a manner that is proportionate to their nature. This would create equal footing for parties, guaranteeing that there is a reasonable allotment of resources per case by the court.

The vision of Woolf and the principles of his report were reinforced in the Civil Procedure Rules (CPR) which came into force on 26th April 1999. The CPR established a common set of procedures and rules for both the county courts and High Court to follow and gave effect to the three hundred plus

changes, amounting to the most radical change to procedure in the last one hundred years. The Woolf reforms did “ not ‘ tinker’ with the existing system; they rewrote it”.[9]The CPR are extensive, but some elements are considered to be more prominent than others. It is these that I will focus on in my assessment of the CPR as the implementation of the Woolf reforms. The following six elements of the CPR were, and continue to be, considered to have had the most effect on the English civil procedure.

Case Management Technique

Lord Woolf believed case management to be vital in solving the key problems of cost, delay and complexity, identifying that “ the three are interrelated and stem from the uncontrolled nature of the litigation process. In particular, there is no clear judicial responsibility for managing individual cases or for the overall administration of the civil courts”.[10]The transfer of control from the parties to the judge was designed to improve the pace and efficiency of litigation through imposing tighter timeframes and reducing case duration. Woolf recommended that in relation to case management, the complexity of rules should be eased through modernising terminology and eliminating the distinctions between procedure and practice.

Woolf not only sought to change the legal culture of the parties and their counsel, but also the role of the judiciary within an organised court service. Case management was an interventionist approach, imposing a more dominant role for the courts whilst not dismissing the English adversarial tradition in its entirety. The judiciary were equipped with wide discretionary powers, for example, imposing early trial dates and refusing any plea to delay the start of a trial. The governing role of the judge is a common aspect

of other continental legal systems and its introduction constituted a shift of the English legal system towards the majority.[11]

Positives

Case management has improved access to justice through increasing the speed of litigation. This initiative determined that it was “ the judges rather than the lawyers who dictate pace. No longer are the larger claims allowed to fester in the ‘ do not touch’ drawers of solicitors’ filing cabinets”. [12]Lawyers were too often judged to slow down litigation, Woolf himself regarding that “ in the majority of cases the reasons for delay arise from failure (by the lawyers) to progress the case efficiently, wasting time on peripheral issues or procedural skirmishing to wear down an opponent or to excuse failure to get on with the case”.[13]Many academics view the shift in management from the lawyers to the more responsible and non-partisan judiciary to be an effective reform. For example, 98% of respondents to the 2001 Woolf Network Third Survey considered that the newly introduced Case Management Conferences worked well in their case.[14]The increase of discretionary power and control has meant that time-wasting and tactical applications have not been tolerated, and breaches of judicial instruction in relation to the final hearing can result in claims being struck out.

Limitations

It is argued that a judge does not necessarily or automatically possess the skills or know-how to manage cases competently, reducing the predictability of a claim. The concern is that competency levels are suggested to decrease down the ranks of the judiciary whilst the levels of discretion are maintained.

Case management has also been argued to constitute judicial over-

involvement, where lawyers who have obtained a deeper knowledge of the case are prevented from deciding how the case should progress. This not only places the responsibility irrationally with the judge, who has only briefly assessed the claim, but also could be construed as reflecting a mistrust of the professionalism of counsel to the dispute.

Case management is predicted to fail as a permanent solution because “ the institution of judicial case management represents a one-time productivity increase” where “ the immediate effect may be lower costs of obtaining justice, but, over the long run, the cost savings will evaporate as a direct result of the cost disease”.[15]This educated prediction of unavoidable failure of case management, and the Woolf reforms and CPR as a whole, must be treated with care, because it is in essence a prediction. However, this calculated forecast of the reform process suggests a negative outcome of case management that cannot be ignored.

The necessary technological advances within the system have also been insufficient to support the implementation of case management. The increased judicial use of computers and telephone conferences, the acceptability of email correspondence in many courts and the advantage of claims beginning online, have all been beneficial, but this is the limit of any technological input. This is not due to the lack of technology available, but rather the justice system barely tapping into the phenomenal potential of technology. It is characteristically a lack of resources and allocated funds that have limited the use of technology, thereby failing to adequately complement the reforms.

Conclusion

It is apparent that there should not be an outright restoration of the responsibility to manage cases back to the parties and their lawyers. The wholesale rejection of judicial case management does not emanate from a fair evaluation of an initiative that has speeded up litigation and, as a direct result, decreased costs. There must be a reassessment of this reform, with the aim of improving the ability of the judiciary to effectively administer and control cases, essentially through a development of training judges in management techniques. In combination with this training, it is vital that there is an increase in the availability of technological support. This initiative seems to be a clear example of the dangers of such an interventionist approach.

Pre-Action Protocols

Pre-action protocols constitute strict procedures and sensible codes of practice which are dependent upon the facts and nature of a case, which parties when confronted with the prospect of litigation are expected to follow. The original two protocols in the CPR, for example, concerned personal injury and clinical negligence respectively. The aim overall was to encourage the early settlement of claims and avoid litigation, such as through an early exchange of full information of the dispute. The protocols follow a similar pattern as the encouragement to participate in alternative dispute resolution, in that compliance with the protocols is not compulsory, but an unreasonable refusal to participate will affect the awarding of costs.

Positives

The success of the pre-action protocols is clear from their expansion from the original two to the current ten, in March 2010. The protocols have increased the structure and organisation of claims, creating certainty for litigants of the pre-trial steps that they are expected to take, such as the effort to settle. This sequentially has stimulated increased levels of dispute resolution and early settlement through the improvement of the pre-action investigation, earlier exchange of information and the enhancement of the relationship and understanding between parties through more pre-action contact. The protocols have also been credited with ensuring that disputes which are litigated are done so on the foundation of detailed preparation and consideration. Further positives include the decrease of nuisance ill-founded claims and the success of the attached code, which categorises disputes which do not fall within the protocols.

Limitations

The protocols have been criticised solely for their burden and lengthy requirements. The obligation to perform tasks such as writing letters, disclosing information and exchanging expert reports all combine to duplicate the process of the claim to follow. A dispute is essentially fought twice, unnecessarily increasing time and costs.

Conclusion

The protocols were a strong success only falling foul in the adverse effect of the burden of administration. They represent the strength of the reforms and suggest that radical reform can be effective if implemented correctly.

The Track System

Under case management, a track system was proposed to assign different procedures to different cases that are separated on the merits of complexity and financial value. The CPR classifies cases into one of the three tracks of small claims, fast track and multi-track.[16]The small claims track is for cases of less than £5, 000 in value and the fast track including claims that are more valuable than £5, 000, but fall below £15, 000, or that fail to fit within the small claims criteria. Fast track cases are deemed to be simpler disputes, and on a slight variation, include landlord-tenant disputes and personal injury cases that are valued between £1, 000 and £5, 000. The multi-track includes all the cases over £15, 000 that fail to be placed in the fast track and small claims.

Positives

The fast track arrangements have been successful in having cases heard quicker, with it being claimed that " this guarantees a final hearing within 30 weeks from soon after the defence has been sent to court".[17]The track system overall is merited for recognising " that cases of different size and complexity should be dealt with in different ways" with it having been noted that " the criticism that such distinctions will condemn many claimants of small sums to second class justice is wholly misconceived".[18]This initiative has increased certainty of timetabling and improves efficiency by ensuring that judicial time is spent proportionately to the issues in claims.

Limitations

The track system is highly controversial because of its technique of the early classification and has struggled to contend with the extensive variables that determine the costs awarded to a party.[19]The most influential variable that has hindered success is the unpredictability of the length of a dispute.[20]In some cases it is close to impossible to balance and account for variables, such as complexity and financial value, in the early stages of a case. The track system must also contend with all the disadvantages of going to court, regardless of which track, including the common problems of cost and time.

Conclusion

The immediate defence of the track system that the analysis and clarification of costs is an ambitious and difficult task is not sufficient to excuse its failure. The system has fallen victim to the overload of variables and has failed to present itself as a competent antidote and controller of excessive costs. This initiative is a disappointment and current calls for its removal are justified. The concerns of the track system once again support the use of Alternate Dispute Resolution processes to reach a settlement, rather than proceed to trial.

Costs

Most of the descriptive guidelines of the overriding objective set out in the CPR concern the costs of litigation. High costs are often magnified by the issue of delay “ which acts as drag or friction upon the economy by reducing the ability of individuals and corporations to increase productivity and fully utilise capital”.[21]At a minimum, costs must be more predictable and

affordable, despite the difficulties of quantifying and identifying the sources of abstract costs not directly related to the litigation process. The objective must be reducing delay that creates excessive costs and constructing an initiative to reduce any influx in costs if a claim is inhibited by delay.

The general rule of costs that the losing party must pay those of the successful party still remains. However, CPR 44. 3 has modified this long-standing rule by introducing exceptions to it and giving the court discretion in the allocation of costs in certain cases. The rules of paying costs also can require the losing party to pay on account before the final sum of costs is decided by the court. This scheme, " coupled with the ability to order costs or a proportion of costs which have been summarily assessed to be paid within fourteen days has established in today's litigation system a concept of what one learned commentator has described as ' pay as you go' system for costs".[22]The early and continuous payment of costs promotes early settlement as the parties assess their cases earlier and can make calculations as to whether their costs will exceed their revenue. This scheme communicates the reality of a claim directly to the parties, encouraging them to rationally manage their finances and clarify and target their personal goals within the claim.

Parties also have an incentive to adopt a more co-operative approach because of the threat of court imposed financial penalties for unreasonable conduct. This is an example of the court utilising a more forceful, realistic and arguably manipulative technique in the practical application of a reform through costs.

Positives

Michael Bacon identified that “ several long established principles relating to legal costs have either been modified or disappeared completely as a result of the Woolf reforms, and one or two totally new concepts and procedures have been introduced”.[23]This dramatic reform has increased the predictability and certainty of costs and balanced unequal financial means between litigants through orders for the party with greater financial resources, but with the weaker case, to pay interim costs. There has also been increased enforcement of procedural rules, and action taken in respect of unreasonable conduct, by the court through automatic costs sanctions.

Limitations

The new costs regime has been criticised predominantly for failing to sufficiently reduce and control costs. Costs have been front loaded and perceived decreases in costs have been shown to be cancelled out by adverse effects of other reforms. In addition, cost sanctions have been criticised for being oppressive and punitive instead of preventing non-compliance with court convention.

Conclusion

Costs have not been successfully reduced and only minor reductions can be identified. The reasoning that costs are difficult to control because of their dependence upon a high number of variables, and the reality that there cannot be a sole recommendation targeting the financial burdens of litigation, are not justification for the failure of a multifaceted scheme designed to reduce costs. The only positive is that the emphasis on costs has

raised the profile and importance of costs overall. This awareness has instigated a new outlook on reducing costs that may develop into a culture. The costs scheme constitutes the major criticism of the reforms overall.

Alternative Dispute Resolution

Reform of the justice system was required to promote more cases to an earlier, controlled settlement as opposed to an untidy, pressured one at the door of the court. The encouragement for early settlement follows Woolf's vision of litigation as the last resort for disputing parties, with the view that any settlement is better than proceeding to trial. This has allowed alternative dispute resolution (ADR) to take a fundamental role, and information on the sources of ADR is provided at all civil courts and legal aid funding is made available for ADR processes. ADR is the umbrella term for a group of techniques used to solve disputes other than through the traditional court adjudication. However, proceedings should not be issued or commenced if settlement is still being explored. The competency of the Centre for Dispute Resolution (CEDR) which nominates mediators, liaises with both parties and prepares the mediation agreement, also became relevant.

In theory, ADR prevents the limitations of the court process from proceeding to fruition. If a claim is settled in mediation, the costs, complexity, adversarialism, time and ineffectiveness of the court procedure are all circumvented. The reduction of cases progressing to trial also reduces the burden on the courts, allows for a more efficient and better resourced procedure and, ultimately, better access to justice. The court was therefore equipped with the power to direct parties to attempt ADR under CPR 26. 4

and to order a month’s postponement, facilitating parties to secure a settlement.

In combination with ADR processes, offers to settle, known as Part 36 offers, provide yet another stimulus to settle before court action. Part 36 offers departed from the traditional structure of settlement, allowing both the claimant and defendant to make an offer to settle before the issuing of the claim or during the actual proceedings. If an offer has been made then this will be taken into consideration by the court when awarding costs.

Positives

There has been a clear cultural change and increased numbers of settlements through the vigorous promotion of ADR. There now exists a regime that encourages and obliges parties and their lawyers to consider settlement and utilise ADR processes. The largely aggressive adversarial behaviour associated with disputes has been softened with a more co-operative and collaborative approach. This culture immediately decreased the number of claims reaching court, with a 19. 6% fall in the number of proceedings issued from 2000 to 2001 in the Queen’s Bench Division. [24]ADR has offered willing litigants the opportunity to participate in a quicker, cheaper and more specific and flexible technique for resolving their dispute. ADR also has many personal advantages for the participants as it can be creative, reduce stress and repair relationships.

Limitations

The essential limitation of ADR is its reliance upon the original participation in mediation. A settlement then relies upon the facts of a case and the

parties’ approach to ADR. Many parties take a half-hearted approach to mediation and have no real intention to negotiate for a settlement. They intend instead to avoid the financial implications of unreasonably refusing to mediate. It is argued that as a result of both failed settlement attempts and indifferent participation in mediation, ADR does not necessarily reduce costs.

Mandatory mediation is argued to constitute the greatest failure of ADR. Professor Dame Hazel Genn,[25]through the voluntary pilot mediation scheme of the Central London County Court (CLCC), identified that the Woolf reforms have motivated parties to mediate in order to avoid financial penalties for unreasonable refusal and create the appearance of following judicial direction. There was also the 2004 Automatic Referral to Mediation Scheme (ARMS) run at CLCC, where one hundred cases a month were selected at random and sent to mediation before any court hearing. Parties unwilling to partici