JUDICIARY OF ENGLAND AND WALES

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ACHIEVING A CULTURE CHANGE IN CASE MANAGEMENT

FIFTH LECTURE IN THE IMPLEMENTATION PROGRAMME

THE JUDICIAL INSTITUTE

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"CAESAR: The Ides of March are come.
SOOTHSAYER: Ay, Caesar; but not gone."[1]

1. INTRODUCTION

1.1 The text of this lecture is being distributed at the start of this seminar. The paragraphs of this lecture are numbered for ease of reference during the discussion which will follow my presentation.

1.2 Terms of reference. It will be recalled that my terms of reference for the Costs Review included a requirement to:
"Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs."

1.3 Role in implementation. I have subsequently been asked to take a proactive role[2] in relation to the implementation of the recommendations made in the Costs Review Final Report ("the Final Report"),[3] following their endorsement by the Judicial Executive Board and their broad acceptance by the Government. This role includes (a) assisting with the drafting of rule amendments and (b) helping to explain the forthcoming reforms to court users. Hence this lecture and the present seminar, which is being very kindly hosted by the Judicial Institute at UCL.

1.4 The call for more robust case management. The call for more "robust" case management has come from many quarters, as recorded in the Costs Review Preliminary Report ("the Preliminary Report") and the Final Report. That call is still being made. See, for example,

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[1] *Julius Caesar*, Act 3, scene 3, lines 1-2
[2] This is subject to the supervision of the Judicial Steering Group, which meets fortnightly and to which I report. The Judicial Steering Group comprises the Master of the Rolls (Head of Civil Justice), Maurice Kay LJ (Vice-President of the Civil Division of the Court of Appeal), Moore-Bick LJ (Deputy Head of Civil Justice) and myself.
[3] Review of Civil Litigation costs: Final Report
http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf

the address of Michael Todd QC (Chairman-Elect of the Bar Council) at the IBA conference in Dubai on 1st November 2011, which included:

"The consistent message I hear from business leaders is that when they conduct litigation, mediation or arbitration, their core requirements are quality, cost-effectiveness and speed. We consistently strive to meet those requirements, but there is more that can be done."

1.5 What does robust case management mean? The concept of robust case management is really a package. It entails:
(i) The delivery of effective case management directions by a judge with relevant expertise who is on top of the case.
(ii) Moving the action along swiftly to settlement or trial.
(iii) Firm enforcement of directions once they have been given – i.e. a "no nonsense" approach.

1.6 A common complaint. A repeated complaint made during the Costs Review was that Lord Woolf's reforms were intended to bring about a culture change, but in fact lawyers have continued to act as they did before. When district judges sought to impose robust case management their decisions were reversed by the Court of Appeal.

1.7 Comment. These criticisms of the civil justice system are not entirely fair. Litigation has undoubtedly speeded up since the introduction of the Civil Procedure Rules 1998 ("CPR") and no longer are actions regularly being dismissed for want of prosecution. Nevertheless there is still work to be done if the culture change which Lord Woolf envisaged in his report[4] and which I envisaged in my Final Report is to be achieved.

1.8 The counter-argument: case management increases costs with little benefit. A number of distinguished jurists have advanced the argument that case management tends to drive up costs to no useful purpose. This argument and the relevant literature are succinctly set out in the final chapter[5] of Michael Legg's excellent new book *Case Management and Complex Civil Litigation*.[6] I have carefully considered this line of argument during the course of the Costs Review and will not rehearse the debate here.

1.9 My view. On the basis of all that emerged during the Costs Review (supplemented by experience at the Bar and on the bench), I am quite satisfied that good case management saves both time and costs, which is to the benefit of both the parties and the court. I do accept, however, that bad case management may drive up costs and do more harm than good.

1.10 Scylla and Charybdis. The intention underlying the present package of reforms is to steer a middle course between Scylla and Charybdis. In this context Scylla is officious inter-meddling by the courts, which gobbles up costs to no useful purpose. Charybdis is *laissez-faire* litigation, which leaves the parties to swirl around in uncontrolled litigation – with all the problems which Lord Woolf identified in his two reports.[7]

1.11 Structure of this lecture. I shall first outline the culture change accomplished in Singapore, in case that holds any lessons for the UK – always accepting that the procedures from one jurisdiction can never be slavishly copied in another, without regard to the different circumstances, geography etc of each jurisdiction. I shall next address the question of firm enforcement of directions. This is because case management directions are of little value to anyone, unless the parties know that the court means what it says and will enforce

[4] Lord Woolf's Final Report on Access to Justice: http://www.dca.gov.uk/civil/final/index.htm
[5] "Can the cure be worse than the disease? – Concerns about case management"
[6] The Federation Press, Sydney, 2011
[7] Lord Woolf's Interim Report (1995) and Final Report (1996)

compliance. I shall then turn to the question of fashioning effective case management directions at proportionate cost and moving litigation swiftly to settlement or trial. I shall finally stress the need for co-operation between the judiciary and the profession in taking forward these reforms.

2. THE SINGAPORE EXPERIENCE

2.1 The position in 1990. By 1990 there was a substantial backlog of cases in Singapore and litigants faced a lengthy wait before trial. An inefficient court system plainly did not inspire investor confidence and it impeded Singapore's remarkable development programme. In 1990 Lee Kuan Yew, the Prime Minister, observed in an address to the Singapore Academy of Law:
"If we want to be a top financial centre, we must have lawyers and courts to match."[8]

2.2 The reforms of the 1990s. In 1990 a new Chief Justice was appointed, Yong Pung How CJ. Under his leadership a policy of robust case management was introduced. Court orders were strictly enforced. The courts started to list "pre-trial conferences" of their own motion in order to monitor progress. If parties were in default, they frequently had their claims or defences struck out. In 1996 the rules of civil procedure in the Singapore Supreme Court[9] were aligned with those of the subordinate courts – as happened in England and Wales in 1999. In 2000 the Singapore courts introduced an Electronic Filing System, which enables all documents in civil litigation to be filed and accessed electronically.[10]

2.3 The consequences of these reforms. The effect of the new approach to case management was electric. In the early period there was much discontent within the profession. However, once parties had adapted to the new regime, it was generally recognised that the long term effect of these reforms was highly beneficial. The work of the profession increased. The enhanced efficiencies in court administration and case management played no small part in helping Singapore position itself as a major financial centre and a leading dispute resolution centre within the Asia-Pacific region.

2.4 Sources of information. For a much fuller account of the case management reforms in Singapore and the culture change achieved, see:
"Judiciary-Led Reforms in Singapore" (W. Malik) published by the World Bank in 2007;
"Case Management – drawing from the Singapore experience" (L.Leo) (2011) CJQ 143 – 162.

2.5 Information from practitioners and judges. It is also enlightening to talk to Singapore practitioners and judges who lived through the reforms of the 1990s. They tell me that the shock tactics of that period, though necessary at the time, have been somewhat softened in recent years. Despite that slight softening by the courts, the culture change achieved in the 1990s is now firmly embedded in the Singapore approach to case management.

2.6 Lesson for England and Wales. I hope that a similar change of culture can be achieved in England when the Costs Review reforms are introduced. It would be an added benefit if, as a result of co-operation with the Law Society and Bar Council, there is a culture change that does not take the profession by surprise and gathers widespread support. Hopefully there will be fewer casualties of the process than there were in Singapore.

2.7 Singapore practitioners and judges have made the point to me that there was insufficient forewarning of the profession and insufficient dialogue with the profession about what lay in

[8] Singapore Academy of Law Journal 2:155
[9] i.e. the High Court and the Court of Appeal. Singapore has no second appellate court above the Court of Appeal.
[10] This will shortly be superseded by "iELS", a substantially enhanced web-based system.

store. Hopefully we can avoid that mistake in England and Wales. The present series of lectures, delivered well in advance of implementation, is intended to contribute to this process.

3. NEED FOR MORE EFFECTIVE ENFORCEMENT OF DIRECTIONS

3.1 Concern expressed during the Costs Review. It became clear during the costs review that there is a general feeling that courts are at the moment too tolerant of non-compliance. The point was made most eloquently by Professor Zuckerman[11] but many practitioners made the same point. For example, claimant personal injury solicitors complained that the courts let liability insurers off the hook for failing to comply with the pre-action protocol and case management directions.[12]

3.2 My first conclusion: courts should adopt a firmer approach. For the reasons set out in chapter 39 of the Final Report, I came to the conclusion that case management directions given by the court needed to be enforced more rigorously than had hitherto been the practice. In particular, the long checklist in CPR rule 3.9 of matters to consider when dealing with applications for relief from sanctions should be shortened and re-focused.

3.3 Second conclusion: courts should monitor compliance. I also concluded that, in so far as time and resources allow, courts should actually monitor the parties' progress in complying with orders and directions. This already happens in mesothelioma litigation (where claimants often have a short lifespan). Furthermore overseas experience suggests that a phone call or email from the court to the parties enquiring about progress can have a dramatic effect. Obviously securing compliance with case management directions is far preferable to punishing non-compliance.

3.4 Recommendation 86. I therefore made the following recommendation, which has two limbs:[13]

"86. The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions."

3.5 Implementation. The implementation of this recommendation will require not only rule changes but also a change of approach by both practitioners and judges.

3.6 Rule changes. The Rule Committee has accepted recommendation 86 and resolved to implement it by making the following changes to CPR Part 3:

Add at the end of rule 3.1 (i.e. after rule 3.1 (7)
"(8) The court may contact the parties from time to time in order to monitor compliance with directions. The parties shall respond promptly to any such enquiries from the court."

In rule 3.9, for paragraph (1) substitute:

[11] See Final Report pages 386-387.
[12] See e.g. Preliminary Report, chapter 10, paras 9.20, 15.7 and 15.8.
[13] In this and all other instances I use the numbering allocated in the list of recommendations at the end of the Final Report: see pages 463-471.

"(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need -

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and court orders."

3.7 Rule amendments held back until big bang. These and other rule amendments will be held in escrow until the general implementation date for the Costs Review reforms. If the provisions in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill survive the Parliamentary process, it is intended that these and related rule changes will come into force on the same date as the legislation. A change in the culture of case management is more likely to be achieved if all the main reforms are introduced simultaneously, rather than sequentially over a period of time.

3.6 Change of approach by judges and practitioners. I hope that effective judicial training will promote a tougher and more pro-active approach by judges to the enforcement of case management directions. The impending rule changes should assist in this regard. I also invite the providers of continuing professional development to consider drawing attention to these matters and promoting the necessary change of culture.

3.7 Tougher approach to late amendments. There is an increasing recognition that late amendments to pleadings are a cause of delay, additional stress and increased costs. Consistently with the above approach, courts no longer adopt such a relaxed approach to late amendments. This is illustrated by the Court of Appeal's recent decision in *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735. For a similar approach in Australia, see *Aon Risk Services Australia Ltd v Australia National University* [2009] HCA 27, (2009) 239 CLR 175.

4. FASHIONING EFFECTIVE CASE MANAGEMENT DIRECTIONS AT PROPORTIONATE COST

4.1 Achieving effective case management directions at proportionate cost. There are a number of separate conditions to fulfil. First, the judge must have the requisite expertise and do the necessary pre-reading. Secondly, the practitioners on both sides must have the requisite expertise and be properly prepared. Thirdly, so far as possible, the same judge must deal with the case at successive hearings. Fourthly, there must be a consistent approach to case management by all courts, rather than local practices which vary from one court centre to another. Finally, robust but reasonably fair case management orders should be upheld by the Court of Appeal, even if the lords justices (perhaps casting their minds back to county court practice in the 1970s) might have preferred a different order.

4.2 My recommendations. The above matters were much debated during the Costs Review. The course of that debate and the competing arguments are summarised in chapter 39 of the Final Report. My conclusions are contained in recommendations 81 to 84 and 87:

> **"81 Measures should be taken to promote the assignment of cases to designated judges with relevant expertise.**
>
> **82 A menu of standard paragraphs for case management directions for each type of case of common occurrence should be prepared and made**

available to all district judges both in hard copy and online in amendable form.

83 CMCs and PTRs should either (a) be used as occasions for effective case management or (b) be dispensed with and replaced by directions on paper. Where such interim hearings are held, the judge should have proper time for pre-reading.

84 In multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early a stage as is practicable.

87 The Master of the Rolls should designate two lords justices, at least one of whom will so far as possible be a member of any constitution of the civil division of the Court of Appeal, which is called upon to consider issues concerning the interpretation or application of the CPR."

4.3 Recommendation 81. Docketing. Docketing[14] is discussed at paras 4.1 to 4.6 of chapter 39 of the Final Report. In relation to multi-track cases, the need for judicial continuity and making best use of specialist judicial expertise is now generally acknowledged. One method of implementing recommendation 81 is now being piloted at Leeds. This pilot is being monitored by Leeds University. In addition DJ Michael Walker (former secretary of the Association of District Judges, now attached to the Senior Presiding Judge's office) is reviewing the outcome of the Leeds pilot and alternative approaches to docketing across the country. The aim is to put in place a national system for docketing (so far as docketing is practicable) by the general implementation date. This must be dovetailed in with the President of the Family Division's drive for judicial continuity in family cases, following the Norgrove review.

4.4 Docketing of large commercial cases. In relation to heavy commercial litigation, I considered that there was scope for increased docketing of cases, as discussed in chapter 27 of the Final Report. I recommended that this should be achieved by means of amending the Admiralty and Commercial Courts Guide.[15] Appropriate amendments have now been made to section D4 of the Guide and I understand that they are proving satisfactory.

4.5 Recommendation 82. Standard directions. A working group chaired by HH Simon Grenfell is preparing a set of model directions and standard directions for use in cases of common occurrence. These will be placed on an appropriate website and available for both judges and practitioners to download.

4.6 Rule amendment. In order to give effect to these standard directions and model directions, the following rule amendment has been approved by the Rule Committee and is being held in escrow:

Add second paragraph to rule 29.1 as follows:
"(2) When drafting case management directions both the parties and the court should take as their starting point any relevant model directions and standard directions which can be found online at … and adapt them as appropriate to the circumstances of the particular case."

4.7 Recommendations 83 and 84. Case management hearings + fixing trial date. In order to

[14] i.e. assignment of a case throughout its life to the same judge, being a judge who has appropriate experience/expertise
[15] See recommendation 50 on page 467 and section 4 of chapter 27 on pages 391-393.

give effect to these recommendations, the Rule Committee has approved the following amendments to Part 29 of the CPR, which are being held in escrow:

Amend rule 29.2 (1) to read:
"29.2 (1) When it allocates a case to the multi-track, the court will –

(a) give directions for the management of the case and set a timetable for the steps to be taken up to and including the date of trial; or may

(b) fix –
(i) a case management conference; or
(ii) a pre-trial review,

or both, and give such other directions relating to the management of the case as it sees fit."

Amend rule 29.4 to read
"29.4 The parties must endeavour to agree appropriate directions for the management of the proceedings and submit agreed directions or their respective proposals to the court seven days before any case management conference. Where the court approves agreed directions or issues its own directions, the parties will be so notified by the court and the case management conference will be vacated."

Amend rule 29.8 (c) (ii) to read
"(ii) confirm the date for the trial or the week within which the trial is to begin; and"

4.8 In addition, both judicial training and training of practitioners will be required if recommendations 83 and 84 are going to be effectively implemented. I express the hope that this will be considered both by the Judicial College and by providers of continuing professional development.

4.7 Controlling the scope of disclosure and over-long witness statements. I shall discuss in later lectures how case management techniques might be used in order (a) to limit disclosure (the costs of which can sometimes be astronomical) and (b) to focus the factual evidence at trial. There will be separate rule amendments to deal with both of these matters.

4.7 No lists of issues. I am sceptical about the value of drafting comprehensive "lists of issues" at an early stage of litigation. Despite the urgings of some, I have not recommended that this should be a requirement. It would merely add another work stage and generate yet more paper or electronic material. The issues are defined by the pleadings. It is to the pleadings that the parties and the court should have recourse when identifying the issues which specific expert[16] or factual witnesses should address.

4.8 Recommendation 87. Promoting consistency in the Court of Appeal. The Master of the Rolls has signified his acceptance of this recommendation. He will nominate two lords justices for this purpose shortly before the general implementation date.

[16] As to which see the fourth lecture in the implementation programme: *Focussing Expert Evidence and Controlling Costs*: http://www.judiciary.gov.uk/media/speeches/2011/lj-jackson-lecture-focusing-expert-evidence-controlling-costs-11112011

5. CASE MANAGEMENT RECOMMENDATIONS NOT CURRENTLY BEING TAKEN FORWARD

5.1 Recommendation 85. This is a proposal that pre-action applications should be permitted where one party refuses to comply with a pre-action protocol. This recommendation requires primary legislation. Provision is not made for this in the current Bill.[17] I understand, however, that such a provision might be considered for inclusion in the next civil justice Bill.

5.2 Recommendation 88. This is a recommendation that district judges might occasionally sit in the Court of Appeal as assessors when case management issues arise. The Master of the Rolls considers that for logistical reasons this should not be taken forward in the near future. He states, however, that serious consideration should be given to implementing this recommendation in the medium term.

6. CO-OPERATION WITH THE PROFESSION

6.1 Consultation in 2009. The case management reforms, which were proposed in the Final Report and are now in the process of being implemented, were the subject of extensive consultation during the Costs Review. Case management issues were discussed at public seminars, held both in London and around the country. They were the subject of (literally) thousands of pages of written submissions prepared by numerous stakeholders and interest groups. I had the good fortune to read all of these written submissions and you can see them summarised in the Costs Review Preliminary and Final Reports.

6.2 Subsequent consultation. Following publication of the Final Report in January 2010, I have attended countless public meetings and seminars at which the Final Report recommendations have been debated. No-one has been bashful about coming forward or slow to publicise their views – both orally and in print. The Judicial Steering Group and I have taken account of all such views expressed.

6.3 Recent meetings with the Chairman of the Bar and President of the Law Society. I have recently met with both the chairman of the Bar and the President of the Law Society, specifically to discuss the issues mentioned above. They have both seen an early draft of this lecture on a confidential basis and I understand that they are generally supportive of the proposed package of case management reforms.

5.4 Law Society Practice Notes. The President of the Law Society has kindly agreed to draw attention to the pending reforms in the regular Practice Notes which the Law Society issues. I am sure that this will be helpful. The Master of the Rolls' office will keep the Law Society informed of developments following (a) decisions by the Rule Committee on specific issues and (b) my quarterly meetings with MoJ officials.

5.5 Goal. The goal of the present round of reforms is to enable both practitioners and the courts to deliver the best possible service to civil litigants at the lowest possible cost.

[17] Legal Aid, Sentencing and Punishment of Offenders Bill