



MASTER OF
THE ROLLS

LORD NEUBERGER OF ABBOTSBURY MR

DOCKETING: COMPLETING CASE MANAGEMENT'S UNFINISHED REVOLUTION

NINTH LECTURE IN IMPLEMENTATION PROGRAMME

SOLICITORS' COSTS CONFERENCE 2012

LONDON, 9 FEBRUARY 2012

(1) Introduction¹

1. This morning I would like to discuss a number of proposals that arise out of the Jackson costs review. In particular I want to focus on docketing. Before doing so however it is appropriate to put the Jackson reforms, and the need to secure their success, into context.
2. Excess litigation cost has for too long blighted our civil justice system. It is a blight which undermines our ability to provide effective access to justice. If litigation costs are unaffordable, then, Lord Woolf observed in his Interim Access to Justice Report, it '*constitutes a denial of access to justice*²'. He was right. It does not however simply amount to a denial of access to justice. On its own that would be bad enough. But effective access to justice is an essential element of any democratic society committed to the rule of law. Where litigation costs deny effective access to the justice, this will in due course undermine belief in, and commitment, to the rule of law, and that results in the

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995) at (9)

undermining of our democracy and all its modern features – health, education, and welfare. In this country, we tend to take the rule of law and all it carries with it for granted, but as the great Judge Learned Hand put it, ‘*If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.*’³ Disproportionate costs improperly ration justice.

3. Over the last ten years, civil litigation costs have continued to increase. In that respect the Woolf reforms, one of the principal aims of which was to provide a cure for excess litigation cost, failed. Indeed, I regret to say that the Woolf reforms are generally thought to have increased litigation costs. Certainly, the reforms, or at least some of the way in which they have been implemented, have front-ended costs, which is particularly unfortunate given that the great majority of cases settle before they get to trial. The failure has been highlighted by Professor Zuckerman, who noted that our system was unique, saying:

‘There is no other system where the courts at all levels are called upon to adjudicate as many disputes over costs. Never before has the eventual incidence of costs been so crucial as to drive litigants to seek court adjudication on them even before commencing proceedings, or soon after. Today the fear of costs is no longer confined to private litigants of modest means, it affects even the rich and even mighty Government departments’⁴.

And, the recent existence and success of the Costs Law Reports and a costs bar, that is a series of law reports and a group of barristers, including QCs, who specialise exclusively in the area of litigation costs, is a measure of the size and significance of such costs.

4. There are, of course, many reasons why the Woolf reforms have failed in this way. I would like to mention three, although other reasons for their failure can, no doubt, be

³ L. Hand cited in G. Hazard, *Rationing Justice*, *The Journal of Law and Economics* (1965) (VIII) 1 at 1.

⁴ Zuckerman (*Zuckerman on Civil Procedure: Principles of Practice* at 999).

advanced. First, they were not fully implemented; the recommendation that all costs on the fast track should be fixed was⁵, for instance, not implemented and the chance to bring such costs entirely under control was therefore lost. Secondly, Woolf required a complete change in litigation culture on the part of the legal profession and the judiciary; such changes always take time to sink in and to implement. In particular, implementation always generates a degree of uncertainty which inevitably results in litigation. The passage of time, and clear and robust judicial guidance where necessary from the Court of Appeal, helps to establish culture, and enable principles to become well-established. Thirdly, the Woolf reforms were, to a large degree, undermined by the maelstrom of satellite costs litigation that Conditional Fee Agreements generated, not least in the area where the reforms were intended to have the greatest effect: personal injury litigation.

5. In the light of the continuing costs crisis, my predecessor as Master of the Rolls, Lord Clarke, decided that this shameful state of affairs could not continue. With the support of the Ministry of Justice, he asked Sir Rupert Jackson, to carry out a fundamental review and make recommendations which if implemented would '*promote access to justice at proportionate cost.*'⁶ Sir Rupert carried out that review in the year he was allotted. His remarkably full, carefully thought out, indeed magisterial, reports and recommendations received the senior judiciary's enthusiastic support. Those recommendations which do not require legislative reform are in the process of being trialled and implemented, under the indefatigable Sir Rupert's watchful eye, which seems never to close, by the Jackson Steering Group, the wider judiciary and the Civil Procedure Rule Committee.

⁵ Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996), recommendation 4.

⁶ Judicial Communications Office, 'Lord Justice Jackson appointed to undertake review of civil costs' (Press Release 03/11/2008) (<http://www.judiciary.gov.uk/media/media-releases/2008/2108>).

6. The reports and recommendations were also warmly welcomed by the Government⁷, which is seeking to implement the vast majority of them that require primary legislation through the Legal Aid and Sentencing Bill, which is currently before Parliament. It is worth noting again however that the Government has, at this stage at least, chosen not to implement all the recommendations. Once more the recommendation that fixed-costs should be the norm on the fast track is something which is not to be implemented. I hope this is one instance where the maxim that those who do not learn from history are doomed to repeat it⁸ does not hold.
7. That word of caution apart, the vast majority of the reforms will, assuming Parliamentary approval is forthcoming, now come into force in April 2013. It is of great importance that we are all ready to implement them on that date, and implement the changed litigation culture they entail. Conferences such as this, and the many lectures Sir Rupert is giving, in which he explains the reforms and how they are to be implemented, are an essential means by which we can all learn about the practical and principled changes they entail. I hope that all practitioners and judges who have been unable to attend any of the lectures will read them – they are on the judicial website.
8. Having made these general points I turn to the focus on this morning's lecture. Before I directly address the matter of docketing, because context is everything, I must mention case management, as it is necessary to appreciate its significance in order to understand the importance of docketing.

(2) Case Management – an unfinished revolution

⁷ Ministry of Justice, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations* (November 2010) at 3 (<http://www.justice.gov.uk/consultations/docs/jackson-consultation-paper.pdf>)

⁸ G. Santayana, *The Life of Reason*, Vol. 1.

9. Two of the most significant aspects of the Woolf reforms were the introduction of the overriding objective, with its commitment to proportionality, and active judicial case management. The former prescribes how litigation is to be conducted by the courts, litigants and their lawyers. The latter provides the means by which that aim is to be given effect by the courts, with the parties' assistance.
10. These two changes could be said to have been revolutionary. The importance of the overriding objective, and proportionality, is unfortunately still not properly appreciated; a point demonstrated perhaps by the White Book's relegation of the commentary on CPR 1 to the back of its second volume. A proper understanding of proportionality, the '*essence of which*', as Sir Rupert put it, '*is that the ends do not necessarily justify the means . . . [that the] . . . law facilitates the pursuit of lawful objectives, but only to the extent that those objectives warrant the burdens thereby imposed upon others*⁹', as it applies to the conduct of litigation will become all the more important after April 2013. It will become all the more important because the new proportionality rule¹⁰ regarding costs will come into force. Proper application of that rule and the principle it articulates, consistently with CPR 1.1(2)(c), and the court's duty to ensure that no more than an 'appropriate', which is again to say proportionate, share of its resources are allotted to each case in light of the

⁹ Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO) (December 2009) at (36) (<http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>).

¹⁰ Jackson (December 2009) at 38: '5.15 I propose that the CPR be amended to include a definition of proportionate costs along the following lines:

"Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party; and
- (e) any wider factors involved in the proceedings, such as reputation or public importance."

need to ensure a proportionate share are allotted to other cases (CPR 1.1(2)(e)¹¹, will underpin the court's approach to case management¹².

11. The overriding objective and the commitment to proportionality on their own are necessary, but not sufficient, conditions for reform to succeed. A recommendation that a change of culture is necessary, with a more economical and efficient approach underpinning that change is quite simply not enough. That is something we ought to have learnt from the failure of the Evershed reforms, which attempted to effect such a change in culture in the 1950s¹³. Those with long memories can perhaps remember the old Summons for Directions; a procedural mechanism which was originally conceived as a means to ensure the pre-trial litigation process was conducted economically and efficiently¹⁴. It is an object lesson in complacency and failure. As Professor Zander put it, if used robustly it would have '*... strip[ped] away the non-essential elements in the case so as to reduce costs*¹⁵'. It failed to achieve that objective because it operated in a system which left the control of litigation in the hands of the parties: robust use simply did not materialise, and the court did not have the procedural tools, or, to be frank, the will, to do anything much about it. As such it was, as one commentator put it '*a dead letter*'.¹⁶

¹¹ See, for instance, *Swain-Mason & Others v Mills & Reeve* [2011] EWCA Civ 14; *Worldwide Corporation Limited v. GPT Ltd* (CA 2 December 1998) at (19); *Charlesworth v Relay Road Ltd & Others* [2000] 1 WLR 230 at 236 – 237; *Arrow Nominees Inc & Another v Blackledge & Others* ([2000] CP Rep 59; [2001] BCC 591 at [73].

¹² As Lord Woolf explained it, in Woolf (1996) at 24, active judicial case management is intended to "*... preserve access to justice for all users of the system it is necessary to ensure that individual users do not use more of the system's resources than their case requires. This means that the court must consider the effect of their choice on other users of the system.*" It is to achieve this through the application of proportionality under both CPR 1.1(2)(c) and (e).

¹³ Evershed, *Final Report of the Committee on Supreme Court Practice and Procedure*, (Command Paper 8878 of 1953) at 9, advocated a '*new approach*' to the conduct of litigation. Unlike Woolf or Jackson it did not provide any real means to effect that cultural change.

¹⁴ RSC (1999) Ord 25; Diamond, *The Summons for Directions* (1959) 75 Law Quarterly Review 43; Evershed *ibid* at 70ff.

¹⁵ Zander, *What can be done about cost and delay in civil litigation*, 31 (1997) Israel Law Review 703 at 706; Diamond (1959) at 44 – 51.

¹⁶ Diamond (1959) at 44. The editors of the Annual Practice put it more gently, noting that while the '*principal intention of [the Evershed Report] was that there should be a thorough stocktaking relating to the issues in an*

12. The summons for directions can with hindsight be understood as a primitive, or Neanderthal, form of case management, and, like the Neanderthal man, it has not survived. It was intended, from the 1950s at least, to be the means to effect a change in litigation culture. In this we can see the necessary condition for effective change: a commitment to a new approach to litigation equivalent to what would be for Woolf and Jackson the overriding objective and proportionality. But the two sufficient conditions were lacking. There was no effective implementation method, and no real will or ability to implement. The Woolf reforms introduced the first of those sufficient conditions, through active judicial case management. As former Senior Master, Robert Turner, has described it the requirement that court's 'actively' manage cases for the first time put '*... the judges in the driving seat of the new reforms and procedures*'; a reactive approach to litigation on their part was replaced by '*proactive intervention*'.¹⁷ A revolutionary change to procedure's aim was matched by revolutionary means to achieve that aim.

13. As to the second requirement, the will to implement, there are, again as Robert Turner rightly observed, three essential elements of effective case management, namely:

- '(a) A proactive judiciary who engage with the litigation from a very early stage;*
- (b) Lawyers who are prepared to put aside during the pre-trial stages the adversarial attitudes of the old regime and adopt a cooperative stance with the courts and with their opponents;*
- (c) A well-resourced court staff who, at all levels, are well trained and experienced in the work required of them at all stages of the life of the litigation.*¹⁸

action and the manner in which the evidence should be presented at a trial with a view to shortening the length of the trial and saving costs generally. . . . The present practice does not always live up to [those] expectations . . .': see Annual Practice (1999) Vol. 1 at 485.

¹⁷ Turner, '*Actively: The Word that Changed the Civil Courts*' in Dwyer (ed), *The Civil Procedure Rules Ten Years On*, (OUP) (2009) at 82.

¹⁸ Turner, *ibid* at 82 – 83.

I hope that the Government provides the necessary resources to ensure that the third requirement in that list does not remain, as it has been in the past, '*the Achilles' heel of the Reforms*'.¹⁹ A commitment to reduce the costs burden of litigation on individuals and on the State as a whole requires effective investment. Without that investment the strains on the rule of law, and on the public purse, will, I fear, not decline. In times of austerity such strains become ever more intolerable.

14. The judiciary, and lawyers, have adapted pretty well to active case management over the last decade. There were teething troubles. That was inevitable given the nature of the change. It is something now with which we are all familiar; and more importantly we now have a generation of solicitors and barristers who know nothing other than a system where there is active case management. There are also many judges who have been appointed since 1999, who know no different approach to carrying out their judicial role. That change cannot be underestimated. What was once novel is for many not just the norm but the only one they have known. It is unsurprising therefore that we have all got better at it; and in this I include the Court of Appeal.

15. Case management has, as I think is widely accepted now, worked quite well in reducing litigation's delay. When well practised, it also, as Sir Rupert concluded, is an effective means to reduce litigation cost²⁰. The aim must be to accentuate the positive and increase the incidence of good practice. In this regard there is one important step which has yet to be taken, and one new element which will link case management even more closely to costs. The new element is of course costs management, which is a welcome innovation

¹⁹ Turner, *ibid* at 83.

²⁰ R. Jackson, *Achieving a culture change in case management*, (Fifth Lecture in the Implementation Programme) (Judicial Institute, University College, London) (22 November 2011) at (2) (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-case-management.pdf>)

proposed by Jackson, which is well on its way to being implemented. It is not the subject of today's talk, but it is too important not to be mentioned. The important step is the subject of today's talk. As implemented, the Woolf reforms did not, in at least one crucial respect, provide the means to maximise the effective use of case management. That respect was their failure to introduce an effective docketing system. As a revolution in our approach to the conduct in civil litigation, the introduction of case management is one which is unfinished. It is the introduction of a form of docketing or, in the terms of the Jackson Report, of '*measures . . . taken to promote the assignment of cases to designated judges with relevant expertise*²¹', which will help to complete that revolution. In doing so, it will assist the court's attempts to maximise the benefits which accrue from case management. It will not just do so in respect of civil justice. It will also do in respect of Family Justice: the Norgrove Review's recommendation that there be greater judicial continuity is docketing by another name²².

16. It is to docketing that I now turn.

(3) Docketing – completing the revolution

17. Docketing is not a new concept. It is a common feature of civil justice systems in other countries, not least Australia and the United States²³. It can mean a number of things. In the United States, for instance, it means that each individual claim is assigned to a specific judge, who then has conduct of the proceedings throughout its life²⁴. The term

²¹ Jackson (December 2009), recommendation 81, at 469.

²² D. Norgrove, *Family Justice Review* (November 2011) at 66 – 68 (<http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-final-report.pdf>); E. Ryder, *The Family Justice Modernisation Programme: First Update*, (January 2012) at 2 (<http://www.judiciary.gov.uk/Resources/ICO/Documents/Reports/family-newsletter-jan-2012.pdf>)

²³ R. Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009, Vol. II) at 586 and 607 (<http://www.judiciary.gov.uk/NR/rdonlyres/642936FA-292D-4432-8CF2-B2A44C7FC4FB/0/jacksonvol2low.pdf>)

²⁴ See H. Woolf (1995) at 64; Jackson (May 2009, Vol II) at 433.

docket there refers to the entirety of cases allocated to an individual judge to manage. So successful has this been as a means to secure effective case management in both complex civil and criminal proceedings, for instance, the United States District Court in the Eastern District of Virginia, that the legal profession there has christened it the ‘Rocket Docket’²⁵.

18. A rigorous approach to case management implemented by a judge who has the sole responsibility for ensuring that the proceedings reach trial quickly – no doubt jet-propelled in the Eastern District – and economically, has produced a litigation culture which achieves that aim. It has produced a culture where litigants and lawyers are well aware that the judge who is responsible for their case is on top of it at all stages will ensure that pre-trial deadlines are reasonably set and kept. It has secured the two essential features of successful case management. First, it has shaped lawyer’s perceptions of the court’s attitude to the conduct of litigation, a perception which is of firm, consistent and knowledgeable approach to the management of their claim. Secondly, it has ensured that the trial date is certain – certain because it has been set by a judge who has detailed knowledge of the nature of the case, the issues, and the scope of the pre-trial proceedings.

19. Under docketing, pre-trial case management deadlines and trial dates are crucial. Once set, and in those cases allocated to the multi-track ‘*trial dates should be set as early as practicable*’²⁶, they should, except in exceptional circumstances beyond the control of the parties, stay set. As the Jackson Report recommended, there should be a much less tolerant approach to parties failing to comply with such directions. Practitioners should make sure they are familiar with the approach taken by the Court of Appeal, under Lord

²⁵ R. Fox, *Justice in the Twenty-First Century* (2000) (Cavendish) at 30ff.

²⁶ Jackson (December 2009) recommendation 84 at 469.

Dyson's guidance when he was Deputy Head of Civil Justice, in the line of authorities on service which culminated in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 WLR 806. The rigorous approach taken to compliance in those cases will become the standard approach under the revised CPR rule 3.9²⁷.

20. A striking example of the benefits of docketing is noted in a study carried out by Thomas Church in the United States. He, and a group of others, studied the speed in which litigation was conducted in 21 cities throughout the United States. In Miami there had been a culture of delay. That culture had not survived the introduction of case management and docketing. Delay decreased. As one lawyer put it,

*'We're accustomed to speed. A culture has developed here as to how cases should move We're all just tuned into moving cases along.'*²⁸

It is reasonable to assume that where delay has decreased, where lawyers move cases along at a pace, there is an attendant reduction in litigation cost; a point not lost in the course of the Jackson inquiry. As noted in the Final Report, the perception of those practitioners from countries where docketing was the norm, was that it reduced both litigation cost and delay²⁹.

21. We should not be surprised that, through reducing delay, docketing has such a beneficial effect on litigation cost. Shortness of time focuses the mind. The inessential is no longer pursued. And so it provides an effective break on siren song of hourly billing. It should

²⁷ Jackson (December 2009), recommendation 86 at 469, *'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.'*

²⁸ T. Church, *Justice delayed – The Pace of Civil Litigation in urban Trial Courts*, (1978) Williamsburg, Virginia: National Center for State Courts at 55 cited in Fox (2000) at 30.

²⁹ Jackson (May 2009, Vol. II) at 434.

ensure that the real issues in dispute are identified and investigated early; a single judge managing the process should ensure that the parties are kept to those issues, and that they deal with them in the way in which the court directed, again with a view to ensuring that the pre-trial process is carried out proportionately. Early identification of issues, of course, is a firm basis for early settlement, which as consequence is promoted by docketing. Where settlement is not achieved, the trial can come on in a reasonable, and proportionate, time. All this promotes proportionate costs, both for the parties and the justice system, and access to justice for all those who need it.

22. It has other advantages too, all of which render the time and expense of litigation more proportionate. Thus, it is not only the individual litigants who benefit. So do the court in terms of the resources it expands on each case. And so do all other litigants who, as a consequence of more efficient, proportionate use of those court resources, are able to progress their own claims more effectively. At first instance, a judge who has control of a case from the point of issue is a judge who is familiar with the case. Time and money are saved, because judicial preparation time is reduced. The more complex a case the more compelling this point becomes. It is obvious that a judge, just like a lawyer, familiar with a case takes less time in familiarising themselves with a claim, than one who comes to it as unknown quantity. Pre-hearing preparation is not the only area where savings can accrue. Just as a well-prepared advocate reduces hearing time, a judge familiar with a claim, previous applications and decisions, will be able to deal with pre-trial hearings more efficiently and economically. It will also reduce the incidence of formulaic case management decisions. Greater familiarity with the claim enables judges to better tailor case management directions to the individual case. Again, this becomes all the more pertinent the more complex a claim becomes.

23. Furthermore, a judge familiar with the claim, who has dealt with all the earlier pre-trial hearings, is also in a much stronger position to know what was submitted and decided at those earlier hearings; all the more important where, for whatever reason, the legal representatives do not remain the same throughout the life of the claim. The opportunity for error arising through lack of familiarity with what went previously on applications or case management hearings is thus minimised.

24. Two further benefits arise from docketing. First, it secures a consistent, predictable approach to the management of each docketing claim. Ensuring that a single judge manages a claim throughout its lifespan secures consistency in a way that, with the best will in the world, a different judge dealing with each separate application or case management hearing cannot. Secondly, it enables the court to keep track of a claim's progress effectively. A single judge responsible for a claim, with the power to check on its, and the parties' progress. If the pre-Woolf period was characterised by the court's passively leaving claims to progress at the pace set by the slowest party to a claim, the post-Woolf period was characterised by the court's actively setting the pace, the post-Jackson era will see the courts not just setting the pace in docketed claims, but actively taking steps to ensure the parties stick to it.

25. Consistency in approach and the ability to keep track of case management between hearings, when taken together with the other benefits which accrue from docketing, will, I hope, enable the court to secure a proportionate approach to the pursuit of justice, and thereby ensure that costs are kept to a proportionate level. And with the advent of costs

management, to which I have briefly referred, docketing will be even more important and desirable.

26. The pilot study on docketing in Leeds, carried out by Taylor and Fitzpatrick and published on 1 February, suggests that the various perceived benefits, such as those which I have highlighted, do accrue when docketing is used³⁰. While the pilot study is limited in scope, it demonstrates that docketing can be carried out effectively and beneficially here. It bears out that the benefits of docketing, such as those noted by Church, can successfully cross the Atlantic.

27. Church's study was carried out in 1978, so we are coming late to the party. Better late than never. That being said, we are not entirely innocent of docketing. It is, to a certain extent, already albeit informally established, and bringing benefits, in some court centres around the country: a point readily apparent from the Taylor and Fitzpatrick report. It was also, of course, noted by Lord Woolf, in his Interim Report, as something which was well-established in certain specialist jurisdictions. One of those is, of course, the Technology and Construction Court, as Sir Rupert well knew, as he presided over it – and did so with characteristic ability and success. In his Final Report he noted that his own experience in that court between 2004 and 2007 demonstrated to him how docketing produced cost-effective litigation³¹. Such positive experience, no doubt played a part in Mr Justice Vos's recent comments that in his view *'there was a strong case for the introduction of a universal docket system in all the Rolls jurisdictions. . . [to] facilitate more active, consistent and hands-on case management, thereby reducing the time taken*

³⁰ N. Taylor & B. Fitzpatrick, *Evaluation of the Pilot of Docketing of Files at Leeds County Court and Registry*, (January 2012) (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/docketing-report.pdf>)

³¹ R. Jackson (May 2009, Vol. II) at 434 *'Between 2004 and 2007 I sat in a court where it was possible for judges to run heavy civil cases on a docket system. My impression from those three years is that a docket system makes it distinctly easier for the court to deliver a cost effective service to users.'*

from issue of proceedings to judgment . . .³², No doubt the Admiralty and Commercial Court's adoption of docketing – designating judges to secure judicial continuity as it is described in the Guide to procedure in those courts – is the first step towards implementing that approach³³.

28. The limited, informal application of docketing may well be established in a number of courts and specialist jurisdictions at the present time. With the introduction of the Jackson reforms in April 2013 it will be formally established as part of the landscape of civil litigation. And so to implementation.

(4) Implementation

29. The first thing to note is that there is no intention simply to introduce a US-style docketing system; to introduce a system where all claims are docketed. The wholesale transposition of a particular form of procedure from one system to another is rarely, if ever, a sensible idea. Civil justice systems in the United States, and for that matter in Commonwealth countries, differ in many ways from our own³⁴ - and no doubt from each other. Those differences, whether they arise from adjectival or substantive law, matter. Our court structure differs from that in the United States. Our approach to judicial deployment, a consequence of court structure, to limitation periods differs, to disclosure, or as it is still over there, discovery, differs - often radically. So we cannot simply say that all cases should be subject to docketing because that happens elsewhere. And even within

³² G. Vos, *The Role of UK Judges in the Success of the UK PLC* (KPMG Lecture 2011) (18 October 2011) at (5) (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/justice-vos-speech-kpmg-lecture-2011.pdf>)

³³ Admiralty and Commercial Courts Guide (2011) section D4 at 25 – 26 (<http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/courts/admiraltycomm/admiralty-commercial-courts-guide-edition9-2011.pdf>)

³⁴ See, for instance, in respect of case management the warning given in Scott, *Caseflow Management in the Trial Court*, in Zuckerman & Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (Clarendon Press) (1995) at 8 – 10.

our own jurisdiction, we should approach case management by reference to the nature of the claim. Introducing docketing so that it applied to all cases, irrespective of the procedural track to which they are allocated, would see small and fast track claims given the same degree of attention as multi-track claims. A universal approach to docketing would simply ignore proportionality, a foundation of both the Woolf and the Jackson reforms.

30. Small and fast track cases should not, at least normally, be subject to formal docketing. If such a case was the responsibility of a single, managing, judge, it would increase cost, and would be unlikely to reduce delay. It is not even right that every multi-track claim will be docketed. A straightforward multi-track case is unlikely to benefit from docketing. As a general rule the more specialist or complex the multi-track claim, the more appropriate it will be to docket it. Many Chancery, clinical negligence, and complex personal injury, claims are likely to be appropriate for docketing, as would other legally or factually complex claims.

31. So docketing will require a careful approach by courts and practitioners. Both will have to consider carefully whether a claim is suitable for docketing. In this respect Practice Guidance, and the use of standard multi-track directions which include docketing, will be issued to ensure an appropriate and consistent approach when this question is addressed, which will generally speaking, be at the allocation stage, although docketing may occur later in the life of a claim. A claim that, at allocation, looked straightforward may not remain so throughout its life. Consistently with the overriding objective, both the court and the parties will be under a continuing duty to keep the status of a claim under review, so that it is docketed when that becomes necessary.

32. The approach to docketing may require fashioning by reference to the approach which the courts take to judicial deployment. To a degree it will require greater judicial specialisation, and, ideally, greater consistency of judicial presence at a given court. The President of the Family Division acknowledged, when he said last November,

‘[T]he days of the judge who only dabbles in [family] work are over. Judicial continuity and proper case management are simply impossible for the circuit judge who, for example, only sits to hear family cases for a few weeks a year³⁵.’

This is equally true of civil justice. The consequence of docketing on judicial deployment may not be as pronounced in civil proceedings as in family proceedings, because of the different degree to which docketing, or judicial continuity, is going to be implemented in the two jurisdictions. But there will be a significant consequence. If we are to succeed in bringing about justice at proportionate cost, such a change cannot be avoided. Successful reform is the product of partnership. If docketing is to enable the courts to work in closer partnership with the parties to ensure that cases are disposed of at proportionate cost, necessary modifications in judicial deployment will be required to enable the courts to implement docketing effectively.

33. The success of docketing does not just depend on judges and the parties. It also depends on Her Majesty’s Courts and Tribunal Service. Its assistance in helping the judiciary implement modified listing practices so that cases can follow their judge will be of fundamental importance. Although this will require careful thought, I am sure that

³⁵ N. Wall, *Changing the Culture – The Role of the Bar and Bench in the Management of Cases involving Children*, (29 November 2011) at [37] (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/pfd-speech-changing-the-culture-29112011.pdf>)

HMCTS should be able to help deliver. Just as I am sure that judges, and practitioners, should take to docketing as well as they took to it in the United States.

(5) Conclusion

34. I want to conclude this morning by recalling something Geoffrey Bindman said in 1992.

Talking about the approach to litigation taken at the time he said this:

‘The secret, perhaps half-perceived at the time, was the open-endedness of litigation. The more work one did, the more one got paid; and there was no limit to the amount of work one could do, and even justify it. Barristers were encouraged (if they needed encouragement) to join in the fun. More recently the tail started to wag the dog. The litigation machines in the large firms had to be fuelled. Every case had to be expanded to fill the resources available to work on it. The pattern set by the larger firms had to be followed by everyone else. However many letters came from one side, the other had to reply. However many affidavits the plaintiff filed, the defendant had to match them – just as one barrister cannot afford to leave unanswered a point taken by his opponent. However much money one side chose to invest in the case, the other had to match it or go to the wall . . .’³⁶

35. Case management and the Woolf reforms generally were a significant step forward in bringing those days to an end. The Jackson reforms are an even more significant step forward in that regard. Together with other reforms, docketing will, I hope, finally bring an end to the days when litigation was open-ended. Docketing is an integral part of the Jackson reforms and their aim to transform our litigation culture into one committed to the achievement of justice at proportionate cost. It may well be that if it succeeds it will be applied more widely. Equally, it may be that if, as implemented, it does not yield the benefits which it gives rise to in other jurisdictions that it will also be applied more widely, as it is in, for instance, the United States. Whichever way, docketing is going to play an important part in the future development of case management. It is in all our

³⁶ G. Bindman, *No expense spared*, (1992) 142 New Law Journal (November) at 1618.

interests, and above all in the public interest, that we all work together to ensure that all these reforms, including docketing, succeed.

36. Thank you.

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