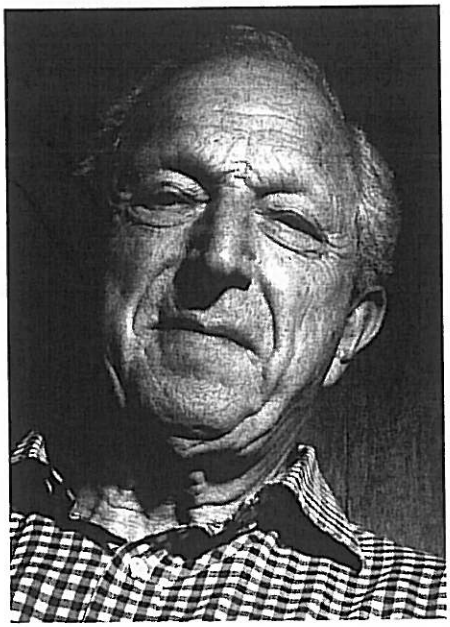
Zander on Woolf

More harm than good? **Professor Michael Zander QC** reflects on 10 years of the Woolf Reforms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When Lord Woolf introduced his reform proposals they were given a broad welcome by just about everyone. The approval rating remains high. In a paper for a conference this last December to mark the 10-year anniversary of the Civil Procedure Rules (CPR), Professor John Peysner wrote: "Virtually all commentators agree that Lord Woolf's vision of the new litigation landscape has been largely successful except in relation to costs."

I was puzzled at the time of their introduction by the almost universal support for the Woolf proposals. I was against them from the outset and spoke out strongly against them—with no effect. I feared that the proposed reforms would have the opposite effect to what was intended, making a bad situation worse rather than better.

Ten years on, I believe that the evidence, summarised below, broadly shows that on the main issues my fears were fully justified. If that is so, it is baffling that the Woolf reforms apparently continue to enjoy such a wide degree of approval.

Costs

On costs, as Professor Peysner said, there is universal agreement. They have gone up which is obviously not what was intended. As Judge Michael Cook, author of *Cook on Costs,* put it: "The idea of the Civil Procedure Rules... was to cut the costs of civil litigation. But the scheme has been spectacularly unsuccessful in achieving its aims of bringing control, certainty and transparency."

The fact that costs have gone up is partly the entirely predictable result of one of the central features of the Woolf reforms—early preparation of cases, early exchange of information between the parties, more cards on the table at an earlier stage. The result? Front-loading of costs.

Pre-CPR, the preparation of the average case that went to trial would tend to take place at a late stage, which Lord Woolf thought was a problem. The trouble is that the front-loading of costs applies not just to the tiny minority of cases that go to trial but equally to the overwhelming majority—well over 90%—that have always settled. In my view this obvious point was never properly grasped by Lord Woolf and, insofar as it was recognised, it was brushed aside with the assertion that in cases that settled, the settlement would be based on a fuller appreciation of the facts.

This may be true—but no one can say what difference that fuller appreciation of the facts makes to the terms of the settlement—in the sense of giving the claimant a better or worse result and at what cost to the paying party. "Early better appreciation of the facts" is of little value if it adds significantly to the costs and makes little or no difference to the terms of settlement. Even if it affects the outcome, it may do so at a disproportionate cost.

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Since reducing costs was one of Lord Woolf's chief aims, if people had realised that in most cases costs would in fact be increased, it is doubtful that the reforms would have enjoyed much support.

It remains to be seen whether the Ministry of Justice's new Advisory Committee on Civil Costs or Lord Justice Jackson's wide-ranging review of litigation costs will result in worthwhile improvements.

Delay

The Woolf reforms addressed the problem of delay in two main ways.

- First, in the fast track, at allocation the parties would be given a fixed date for the trial 30 or so weeks hence.
- Second, the courts would adopt a new stance and would manage the process of litigation—lighter case management for the fast track, heavier for the multi-track.

Giving the parties a fixed date for trial at an early stage is a good idea that has worked well for the fast track. But did it cut delays? To test that question it is necessary to look at the figures pre- and post-Woolf. The figure to look at is not the period to trial from the start of the proceedings but the period to trial measured from the time that the solicitor first receives his instructions. The reason is obvious. Since the fast track created a Procrustean bed with a fixed date for trial, the solicitor needs to get his tackle in order before he starts the proceedings.

The only study that produced such figures was conducted for the Civil Justice Council and the Law Society by Tamara Goriely, Richard Moorehead and Pamela Abrams (*More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour*). They found that, overall, delay had remained the same. While the post-issue stage had got quicker, the pre-issue stage had got slower. Both before and after the reforms, the average

standard fast track case took 13 months to complete. There are no equivalent multi-track figures.

As to the effect of case management on delay, again there are no figures. Professors John Peysner and Mary Seneviratne's study of case management reported that some judges thought that it actually caused delay and that at least some solicitors could case manage more effectively than judges (*The Management of Civil Cases: the Courts and the Post-Woolf Landscape*).

Case management

Case management was the central idea behind the Woolf reforms. Lord Woolf took the view that the ills of civil litigation could be ascribed to the way that lawyers conducted cases and that the way to cure the ills was to transfer the responsibility for the progressing of cases from the lawyers to the judges.

In my view, Lord Woolf's analysis was faulty on both counts. To make the lawyers the chief villains was far too simplistic. KPMG Peat Marwick's 1994 *Study on Causes of Delay in the High Court and County Courts* found that there were many causes of delay other than the lawyers, including the anatomy of the case, delay caused by the parties themselves, external factors such as the difficulty of getting reports from experts, court procedures and court administration. The study was ignored by Lord Woolf.

What of the proposition that judicial case management would improve matters? There is no English empirical study that attempts to evaluate the impact of judicial case management. But there was such a study in the US. A few months after publication of Lord Woolf's *Final Report*, the Institute of Civil Justice at the Rand Corporation in California published a study of the effect of judicial case management based on a five-year survey of 10,000 cases in 20 federal courts in 16 states. (For two articles by the writer on the Rand Corporation's study see 147 NLJ 6782, 7 March 1997, p 353 and 147 NLJ 6787, 11 April 1997, p 539.) From the point of view of Lord Woolf's proposals, the results were, to say the least, discouraging. The package of reforms, it was found, "had little effect on time disposition, litigation costs and attorney satisfaction and views of the fairness of case management". The reason was that whereas some of the changes introduced had a beneficial effect, these were cancelled by others that had an adverse effect. In particular, the study found, "early case management is associated with significantly increased costs to litigants".

The Rand report explained that case management tends to increase rather than reduce costs because it generates more work by lawyers. This is true not just at the earliest stages. It applies to case management at all stages.

Inconsistent judicial decisions

One of my chief concerns was that Lord Woolf's reforms would vastly increase the scope for inconsistent decision-making by judges, with a generally destabilising effect on the whole system. Judge Michael Cook wrote of this in regard to costs: "There is a growing concern among judges and lawyers that the new rules have become a lottery. Parties have little idea of how much they will recover if they win or how much they will have to pay if they lose."

The rules, starting with the "overriding objective" with its multiple and potentially conflicting considerations, give the judges virtual carte blanche to decide in whatever way they think right. Judges notoriously vary in their approach to procedural issues, including whether a breach of the rules should result in sanctions.

Moreover, this new scope for the exercise of judicial discretion is largely uncontrolled and uncontrollable. The Court of Appeal has made it clear that normally it will not interfere. Sir Henry Brooke, a key member of the Court of Appeal in handling CPR issues, said at the December conference that that was the right approach: "If this new practice, and the existence of the overriding objective, gives the procedural judge at first instance greater immunity from appeal or review, then I believe that it has been very well documented that this has been no bad thing. The limited scope for appealing a discretionary decision provides a sufficient remedy when things have clearly gone wrong. If they have not, it is much better to get on with the case even though another judge might have made a different decision."

Better from the point of view of the Court of Appeal certainly. But whether litigants are better off with a less predictable system which is more interested in throughput than the result is less clear.

Complexity

Lord Woolf wanted the system to be simpler and easier to navigate. Peter Thompson QC paints the true picture: "In 1998, before the new rules came into force, the rules of procedure took up 391 pages of the *County Court Practice*... we now have three sets of rules which, together with practice directions and protocols, cover 2,301 pages of volume 1 of the *Civil Court Practice*, a 550% increase!" (see *NLJ*, 27 February 2009, p 293).

Moreover, the system changes all the time. In the 10 years of the CPR there have been no fewer than 49 updates. (The Ministry of Justice's website for the CPR warns that the latest update, due to take effect in April, "introduces changes in a large number of areas".)

The adversary culture

One area in which I believe that the Woolf reforms may have been beneficial is in regard to the adversary culture. At least this is what is said by practitioners, by judges and by researchers. But whatever the feel-good benefits of a softer aspect to litigation practice, I find it difficult to believe that it has a significant pay-off for the parties themselves. My guess is that mostly it amounts to little more than the lawyers going through the motions of appearing to act reasonably in order to avoid an adverse costs order.

I predicted that the Woolf reforms would do more harm than good. Of course there have been some improvements. (The single-joint expert and Part 36 offers are examples.) But on what I thought were the main issues it appears from the evidence that that, unfortunately, is what has happened. NLJ

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This is the second in a series of articles to celebrate the 10th anniversary of the introduction of the Civil Procedure Rules in April.

If you would like to contribute to the series, which is focusing on the impact of the rules (good and bad) and predictions for the road ahead please e-mail: *newlaw.journal@lexisnexis.co.uk*

A few home truths

More thoughts about "Zander on Woolf" by **Tony Allen**

To respond to an article which revisits the Civil Procedure Rules (CPR) critically and which does not deplore the growth of mediation is certainly a bit of a holiday (see "Zander on Woolf": *NLJ*, 13 March 2009, p 367).

While the CPR may have aspired to save costs through simplifying and streamlining, they seem not to have done so. I am not, however, persuaded that this is because of the CPR, but perhaps despite the CPR, and because some aspects of the Woolf reforms remain insufficiently enforced.

The long view

The first impact made on litigation practitioners when the CPR were published in early 1999 (with Lord Irvine refusing to countenance delay) was of a penal code, littered with references to costs sanctions. As my former firm retreated to a nearby school library to gear up for the new regime, the fear that our urbane local district judges would at midnight on 26 April 1999 turn into ravening juridical werewolves intent on feasting on the flesh of uncompliant lawyers was vividly in our collective minds.

What drove the repeated application of cold towels was the fear that we would be in constant touch with our professional indemnity insurers, quite apart from writing weekly apologies to our clients about the fact that yet again we had incurred a costs sanction for some apparently unforgiveable (even if only marginally wicked) breach of the rules.

When we discovered that the district judges were arguably less comprehensively trained and just as uncertain about the effect of the CPR, and turned out to be less keen to impose sanctions than we had feared, litigation life became tolerable again.

When we discovered that it could be conducted in a much more civilised style, with sanctions imposed mainly for unreasonable litigation behaviour, we became even more cheerful and unremittingly reasonable.

The Denning inheritance

But importing the word "reasonable" into anything to do with the law inevitably plays into the hands of lawyers, delivering margins for discretionary uncertainty of great breadth. When, early on, apparently conflicting decisions on costs like *Ford v GKR* and *Jones v Jones* could be delivered by courts within touching distance of each other, we realised that the inheritance of Lord Denning was in legal terms pretty safe.

Yet was it any better in the non-Denning areas of the old regime? Compare the positions on payment into court and Part 36 offers? Was it not extremely rough justice on a party who beat or lost to a payment into court by £1 or even 1p when that party had obdurately fought and lost on most points at trial but just squeaked a win of the war?

> **"Anecdotally cases seem to reach trial quicker than 10 years ago and waiting lists have to a large extent dwindled"**

A new culture

Michael Zander (perhaps a little reluctantly) acknowledges the incontrovertible undermining of the old adversarial culture. This is the most undoubted and beneficent outcome of the threat of costs sanctions for unreasonable behaviour.

When I train mediators in common law jurisdictions like Ireland, Scotland, Pakistan, India, and South Africa, it always jolts me that, except in England and Wales, it is still largely true that not to ambush is negligent. Trials can still start with undisclosed documents, witness statements and expert reports.

How can ambush be fair on the parties whose case it is? They are entitled to advance notice of allegations and time to give answers where they can. Justice has not been undone, for instance, by advance disclosure of enquiry evidence films—a pre-Woolfian but very Woolfian development. Surely no one can seriously advocate the abolition of the cards-on-the table mindset for civil justice?

Profound change

Oddly one of the profoundest changes to civil practice wrought in 1999 was not by the CPR's insistence on case management, but by the introduction of summary assessment and payment of costs on "interlocutory" summons and applications.

The need to pay costs awarded immediately either threatened solicitors' bank accounts or their relationship with their client. Suddenly hundreds if not thousands of applications for particulars or further discovery vanished from the chambers' lists of masters and district judges, and the Bear Garden was translated to its current status as a haven of peace, handling perhaps three or four case management conferences a day.

These tit-for-tat summonses are, I suggest, no great loss as a phenomenon, and were hugely wasteful of time, as were the convoluted summonses to strike out for want of prosecution, loyally defended and appealed by professional indemnity insurers.

Delay and costs

Should we be surprised that, as Michael Zander suggests, the CPR appear neither to have saved costs nor to have reduced delay? I cannot compete with Professor Zander's over empirical evidence concerning delay, but anecdotally cases seem to reach trial quicker than 10 years ago and waiting lists have to a large extent dwindled. In my view, it is not surprising that costs and delay still exist, but this has little to do with the CPR.

Legal drivers

Two things drive litigation lawyers, apart from a proper professional determination to deliver best service to their clients:

- one is the need to earn for their work; and
- the other is to avoid professional indemnity claims.

To settle early on the basis of inadequate information may be injudicious: to settle before earning back the price of the referral fee paid to get the work may be financially unsound for the lawyer, even if it has nothing to do with the client's desire for swift settlement. In truth there are other interests at stake here that might explain unresolved delay and expense.

Alernative dispute resolution (ADR)

The CPR and the Pre-action Protocols together intended to make settlement possible in a vast majority of cases before issue of proceedings, hence the requirement for front-loading work. Clients (both claimant and defendant) might thus hope for early resolution, and solicitors in particular for a cashflow benefit. Instead, despite the strictures in each Protocol (reinforced by CPR Pts 1 and 44.5) is the requirement to try ADR where orthodox settlement fails or is not tried.

There is simply no evidence that this requirement is being enforced at the allocation stage in issued cases.

Masters and district judges need to make an example in a few high-profile cases, one of which might perhaps reach the Court of Appeal, which can modify practice across the board by repeating the kind of expectations it articulated in *Cowl v Plymouth City Council; Dunnett v Railtrack; Halsey v Milton Keynes NHST;* and *Burchell v Bullard.*

What mediation offers at the pre-trial stage is a guaranteed opportunity for all decision-makers to come together to review where a claim has reached and to check whether they cannot or do not want to settle then, dealing with any communication breakdown so typical even now of litigation, and honestly reviewing and balancing the risks of ongoing investment of time and cost against any shortfall in available information—indeed often remedying that shortfall within the mediation process anyway.

Once litigation is under way in cases where this is necessary or pre-trial obligation to try ADR has been ignored by lawyers or procedural judges, courts can now without hesitation order ADR in the light of Sir Anthony Clarke MR's emphatic view (evident at the Civil Mediation Council conference in 2008) that the Court of Appeal in *Halsey* was wrong and *obiter* in doubting whether such orders could be made against the wishes of either or both parties.

Professor Zander does not join Professor Hazel Genn's 2008 Hamlyn Lectures' strictures about the decline of civil justice, and whether the growth of ADR has any part in that, but in truth even his moderate gloom about the Woolf reforms doing more harm than good seems on balance to be a harsh view. If the Woolf scheme were to be delivered as intended by the courts, it would provide an even better system for parties keen for swift and affordable outcomes than at present, and it has always been a truism for Lord Woolf that it is for the benefit of litigants that our civil justice system must unswervingly be directed. NLJ

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